From:	Ring, John
To:	Carlton, Peter J.; Kraus, Grant; Loendorf, Brian
Subject:	FW: D.C. Circuit decision in Kitsap Tenant Support Services, Inc., Board Case 19-CA-074715 (reported at 366 NLRB No. 98)
Date:	Thursday, May 2, 2019 6:52:00 PM
Attachments:	18-1187 Kitsap Tenant Judgment fld.pdf Kitsap 18 1187 NLRB Brief.pdf.pdf

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Now, (b) (6), (b) (7)(C)

From: Burdick, Ruth E.
Sent: Thursday, May 2, 2019 12:36 PM
To: Arbesfeld, Mark <Mark.Arbesfeld@nlrb.gov>; Barham, Jeffrey <Jeffrey.Barham@nlrb.gov>; Bock, Richard <Richard.Bock@nlrb.gov>; Carlton, Peter J. <Peter.Carlton@nlrb.gov>; Coleman, Jocelyn <Jocelyn.Coleman@nlrb.gov>; Colwell, John F. <John.Colwell@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>; Finkelstein, Marci J. <Marci.Finkelstein@nlrb.gov>; Free, Douglas <Douglas.Free@nlrb.gov>; Giannasi, Robert (ALJ) <Robert.Giannasi@nlrb.gov>; Goldstein, Steven <Steven.Goldstein@nlrb.gov>; Head, Brittani <Brittani.Head@nlrb.gov>; Jacob, Fred <Fred.Jacob@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Krafts, Andrew J. <Andrew.Krafts@nlrb.gov>; Kraus, Grant <Grant.Kraus@nlrb.gov>; Lambert, Malissa <Malissa.Lambert@nlrb.gov>; Lennie, Rachel G. <Rachel.Lennie@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; ML-HQ-Advice <ML-HQ-Advice@nlrb.gov>; ML-HQ-Appellate and Supreme Court Litigation Brch <ML-HQ-AppellateSupremeCourtBranch@nlrb.gov>; ML-HQ-Contempt, Compliance, and Special Lit Branch <ML-HQ-ContemptLitigationandComplienaceBranch@nlrb.gov>; ML-HQ-Solicitor's Office <ML-HQ-Solicitor'sOffice@nlrb.gov>; Murphy, James R. <James.Murphy@nlrb.gov>; Platt, Nancy <Nancy.Platt@nlrb.gov>; Qureshi, Farah Z. <Farah.Qureshi@nlrb.gov>; Rappaport, Steve <Steve.Rappaport@nlrb.gov>; Ring, John <John.Ring@nlrb.gov>; Robb, Peter <Peter.Robb@nlrb.gov>; Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov>; Sophir, Jayme <Jayme.Sophir@nlrb.gov>; Stock, Alice B. <Alice.Stock@nlrb.gov>; Walkowiak, Robert G <Robert.Walkowiak@nlrb.gov>; Watts, Elicia <Elicia.Watts@nlrb.gov>; Zick, Lara S. <Lara.Zick@nlrb.gov>
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Subject: D.C. Circuit decision in Kitsap Tenant Support Services, Inc., Board Case 19-CA-074715 (reported at 366 NLRB No. 98)

In an unpublished judgment that issued Tuesday, April 30, 2019, the D.C. Circuit enforced the Board's order issued against this provider of residential living facilities to individuals with developmental disability for unfair labor practices committed before and after its care-giving employees voted 44 to 14 in a 2012 election to be represented by Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO. Dispensing with oral argument, the court upheld the

Board's unfair-labor-practice findings, as well as the special remedies ordered for the violations committed during first-contract bargaining. The court also held that a challenge to the ratified complaint was jurisdictionally barred for review under Section 10(e) of the Act.

The Board (Chairman Ring and Members Pearce and McFerran) found that the employer, prior to the election, violated Section 8(a)(3) and (1) of the Act by discharging a key organizer, by placing two others on administrative leave and discharging them, by taking a series of adverse actions against and demoting a fourth organizer, and by enforcing work rules more strictly in response to union organizing. Further, the Board found that, after the election, the employer violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the union at reasonable times, by refusing to furnish or by delaying the provision of requested information, and by engaging in overall bad-faith bargaining for the entire first year of the parties' collective-bargaining relationship. Among the special remedies ordered, the Board required the employer to meet and bargain with the union within 15 days of a bargaining request, to bargain in good faith and at reasonable times, to meet for a minimum of 15 hours per week or on an alternative schedule to which the union agrees, and to submit written bargaining progress reports every 15 days to the regional office.

On review, the court held that the employer's challenges all lacked merit. Regarding application of the *Wright Line* standard, the court agreed with the Board that the employer had failed to carry its burden proving its affirmative defenses, or, with respect to one violation, that the employer's stated reasons were pretextual. Noting that the factual determination of whether a party has bargained in good or bad faith is a matter within the Board's special expertise, the court held that the record supported the Board's findings that, among other actions, the employer's negotiator engaged in regressive bargaining tactics, repeatedly failed to respond to union scheduling requests, and canceled or cut short several meetings. On the remedial issues, the court summarily enforced the special bargaining remedies after determining that the employer failed to challenge them before the Board. Further, the court rejected the argument that restatement was inappropriate because the employees were discharged "for cause," noting the contention is contrary to the Board's settled interpretation Section 10(c) of the Act.

The court's unpublished judgment, and the Board's brief to the court, are attached.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1187 **September Term, 2018**

FILED ON: APRIL 30, 2019

KITSAP TENANT SUPPORT SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1217

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GARLAND, *Chief Judge*, HENDERSON, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the NLRB's cross-application for enforcement be granted.

On May 31, 2018, the Board found that petitioner Kitsap Tenant Support Services had unlawfully disciplined four employees and violated its statutory duty to bargain during and after its caregiving employees' successful unionization campaign. The Board's remedy required Kitsap to bargain with the union for fifteen hours per week and to submit periodic progress reports, and to reinstate the disciplined employees with backpay. We conclude that all of Kitsap's challenges in its petition for review lack merit.

First, the Board correctly applied its *Wright Line* test to all four disciplined employees, and its findings are supported by substantial evidence.

(a) *Bonnie Minor*. The Board reasonably concluded that substantial evidence supports the prima facie case, relying on Minor's membership in the union's organizing committee, her extremely strong annual performance review just one week before her discharge, her lack of any previous discipline, her termination the same day she spoke at Kitsap's mandatory meeting regarding unionization, and Kitsap's other actions demonstrating anti-union animus. J.A. 117-19; *see Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015). Kitsap failed to meet its burden in rebuttal because Program Manager Alan Frey never mentioned forthcoming discipline when reprimanding Minor for canceling a client Christmas party and engaging in "triangulation" with clients; Kitsap did not identify any other employee ever discharged for "counter-therapeutic" conduct; and the Board showed that Kitsap tolerated worse conduct by other employees. J.A. 119-20, S.A. 1-3.

(b) *Alicia Sale and Hannah Gates*. The General Counsel met his initial burden by showing that Kitsap knew Sale and Gates were members of the union-organizing committee, placed Sale and Gates on administrative leave two days after receiving notice that the union campaign had been successful enough to support an election petition, and disciplined Sale and Gates more harshly than other employees who intentionally harmed clients. J.A. 121, S.A. 1-3. Kitsap's argument in rebuttal, that it had a good-faith belief that Sale and Gates engaged in misconduct, fails because Kitsap did not "parcel[] out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred." *Ozburn-Hessey Logistics v. NLRB*, 833 F.3d 210, 221 (D.C. Cir. 2016) (citation omitted).

(c) *Lisa Hennings*. Finally, the Board reasonably concluded that Hennings' demotion was unlawful because Kitsap was aware of Hennings' union membership and issued several pretextual letters of discipline against her, including for tardiness (though the General Counsel demonstrated that other tardy employees were not so disciplined), for scheduling beyond the scope of her role (though Frey admitted that such scheduling was routine), and for failing to complete client narratives (though Kitsap so disciplined no other employees in Hennings' house). *See* J.A. 124-27; S.A. 4-7; *Ozburn-Hessey*, 833 F.3d at 219-20.

Second, substantial evidence supports the Board's conclusion that Kitsap violated § 158(a)(3) of the Act by increasing its enforcement of disciplinary rules due to its employees' union support. Kitsap does not dispute that a deviation from prior practice coincided with the union election, and its purported concern about a potential state audit was pretextual. *See* J.A. 127-29; *Jennie-O Foods*, 301 N.L.R.B. 305, 311 (1991).

Third, we find that the Board adequately supported its conclusion that Kitsap did not "meet at reasonable times" and bargained in bad faith. 29 U.S.C. § 158(d); *see id.* § 158(a)(5) (recognizing "refus[al] to bargain collectively" as an unfair labor practice). Kitsap's negotiator repeatedly failed to respond to union scheduling requests and canceled or cut short several meetings. J.A. 109-12. Kitsap also engaged in regressive tactics by accepting and then rescinding an agreement to include heads of household in the bargaining unit. J.A. 115. Kitsap further violated its duty to bargain by failing to turn over information relevant to evaluating its proposal with respect to wages. *See KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Given that the "drawing of inferences

as to good or bad faith in the bargaining process is largely a matter for the Board's expertise," the Board has adequately supported its conclusion in this case. *Int'l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted).

Fourth, we reject Kitsap's challenges to the Board's remedial order. We lack jurisdiction to consider Kitsap's challenge to the mandated bargaining schedule and status reports because Kitsap did not raise that argument in a motion for reconsideration before the Board. *See* 29 U.S.C. § 160(e). Kitsap also claims that the Board's remedy of reinstatement with backpay for the four employees is punitive. But this is the Board's conventional remedy, *see, e.g.*, *Precoat Metals*, 341 N.L.R.B. 1137, 1138 (2004); Kitsap's suggestion that the employees were disciplined "for cause" conflicts with the Board's settled interpretation of this term, 29 U.S.C. § 160(c); *see Anheuser-Busch, Inc.*, 351 N.L.R.B. 644, 647 (2007); and Kitsap's argument that these employees were "unfit" for reinstatement fails because Kitsap did not deem unfit other employees who engaged in considerably worse misconduct, *cf. NLRB v. W. Clinical Lab., Inc.*, 571 F.2d 457, 460 (9th Cir. 1978).

Finally, we lack jurisdiction to consider Kitsap's claim that the complaint was not properly ratified because that objection was not raised before the Board. *See* 29 U.S.C. § 160(e).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Oral argument not yet scheduled

Nos. 18-1187 & 18-1217

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	Nos. 18-1187 & 18-1217
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	19-CA-074715, et al.
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

Petitioner/Cross-Respondent Kitsap Tenant Support Services, Inc. ("Kitsap") was the Respondent before the Board in the underlying proceeding (Board Case Nos. 19-CA-074715 et al.). The Board's General Counsel was a party before the Board. Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO, was the charging party before the Board.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against Kitsap on May 31, 2018, and reported at 366 NLRB No. 98.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 19th day of February 2019

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Federal Vacancies Reform Act
(5 U.S.C. §§ 3345, et seq.)

GLOSSARY

Act	The National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	The National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent Kitsap Tenant Support Services, Inc.
FVRA	Federal Vacancies Reform Act (5 U.S.C. §§ 3345, et seq.)
JA	Joint Appendix
Kitsap	Kitsap Tenant Support Services, Inc.
SA	Supplemental Appendix
Union	Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1187 & 18-1217

KITSAP TENANT SUPPORT SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Kitsap Tenant Support Services, Inc. to review, and the cross-application of the National Labor Relations

Board to enforce, a Board Decision and Order against Kitsap issued on May 31, 2018, and reported at 366 NLRB No. 98. (JA108-42.)[1]

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties.[2] This Court has jurisdiction and venue is proper under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit and the Board to cross-apply for enforcement.

Kitsap's petition for review and the Board's cross-application for enforcement were timely. The Act places no time limit on those filings.

ISSUE STATEMENT

1. Whether substantial evidence supports the Board's findings that Kitsap violated Section 8(a)(3) and (1) of the Act by retaliating against four pro-union employees and enforcing workplace rules more strictly because of union activity.

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[1] Record references are to the Joint Appendix ("JA") and Supplemental Appendix ("SA"). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Kitsap's opening brief.

[2] The Board severed and retained allegations involving Kitsap's employee handbook that are factually and legally distinct from the violations adjudicated in the Decision and Order. (JA127,132.) The Board's retention of the severed allegations does not affect the finality of its Order. *See, e.g.*, *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1249-50 (D.C. Cir. 2012). Kitsap acknowledges the Order's finality. (Br.1.)

2. Whether substantial evidence supports the Board's finding that Kitsap violated Section 8(a)(5) and (1) of the Act by failing to meet with the Union at reasonable times, refusing to provide or delaying information sought by the Union for collective bargaining, and engaging in overall bad-faith bargaining.

3. Whether Kitsap's challenge to the ratification of the underlying unfair-labor-practice complaint is properly before the Court.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case came before the Board on a consolidated complaint issued under Acting General Counsel Lafe Solomon's tenure on June 22, 2012. Before a hearing on the complaint allegations, Kitsap moved to dismiss, asserting that Solomon did not hold office consistent with the Federal Vacancies Reform Act (5 U.S.C. §§ 3345 et seq.) ("FVRA") when the complaint issued. An administrative law judge denied Kitsap's motion and, after a hearing, issued a decision and recommended order finding merit to some of the complaint allegations and dismissing others. The parties filed exceptions to his decision with the Board. (JA108&n.1,5-11;134-42.)

On March 21, 2017, while the case was pending before the Board, the Supreme Court issued *NLRB v. SW General, Inc.*, 137 S. Ct. 929, holding that, under FVRA, the Acting General Counsel could not have continued serving in his

position after President Obama nominated him to be General Counsel on January 5, 2011. On April 14, 2017, General Counsel Richard F. Griffin, Jr. issued a Notice ratifying the complaint and its continued prosecution. (JA108n.1.)

On May 31, 2018, the Board issued its Decision and Order finding that the ratified complaint allegations were properly before it, and rejecting as moot Kitsap's challenge to the validity of the complaint issued under Solomon. Addressing the merits, the Board affirmed the judge's findings of certain unfair labor practices, but found additional unfair labor practices based on the record discussed below. (JA108&n.1,109-29.)

II. THE BOARD'S FACT FINDINGS

A. The Union Campaign Begins; Kitsap Discharges Pro-Union Employee Minor When She Questions Kitsap's Labor Consultant

Kitsap provides residential living facilities and services to clients, individuals with varying degrees of developmental disability. In November 2011, the Union began a campaign to represent Kitsap's residential employees, including those designated as Heads of Household (HOH). (JA108;212,325,755-60,785-86,877.)

With the campaign, the Union conducted an organizing "blitz" in early December, visiting employee homes, soliciting signed authorization cards, and holding a December 4 meeting for interested employees. In response, Kitsap-

announced it would hold a mandatory employee meeting on December 7. (JA117;186-89,192,633.)

Early that day, employee Bonnie Minor, who had attended the union meeting, received a call from Kitsap General Manager Alan Frey at the home where she worked. He chastised her for cancelling a customary multi-residence Christmas party—a step she had taken based on client feedback about the difficulty of back-to-back parties during the holiday season. Frey instructed her to schedule the party, which she promptly did. He said nothing about possible discipline for this incident. (JA117;193,214-15,243-46,249-51,259,284-86,813-14,818-19.)

After the call, Minor vented to clients in the vicinity that Frey had yelled at her and had been mean. A co-worker reported Minor's comments to Frey, who summoned Minor to his office, where he stated, in the presence of Human Resource Representative Kathy Grice, that Minor's behavior constituted inappropriate "triangulation." Frey said nothing about potential discipline. (JA117-18;252-53,738-39,819-22,884.)

Later that day, Minor attended Kitsap's mandatory meeting, which was conducted by an outside consultant who discussed the disadvantages of unionization. During the meeting, Minor raised her hand and asked the consultant "how much money [Kitsap] was paying him." Later that day, Grice informed Minor that she was discharged for "insubordination." Kitsap's subsequent

termination letter cited other purported infractions, including not following protocol concerning the holiday party and maintaining professional boundaries, and misrepresenting information to clients. (JA117-18;232,253-57,263-67,273-74,276,287-88,634-36,737-38.)

B. Kitsap Monitors Employee Performance More Closely; It Places Union Supporters Sale and Gates on Administrative Leave, Then Discharges Them

On December 14, the Union distributed a flyer identifying employee members of its organizing committee, including Alicia Sale, Hannah Gates, and Lisa Hennings. The flyer found its way to General Manager Frey in mid-December. Around the same time, Hennings directly told Frey that she was "pro union." He said he "kind of figured that." (JA117,120,124;198-200,212-13,736-37,789-91,1596.)

As the union campaign gained momentum, managers began visiting client residences more frequently and inspecting them more closely. For instance, Frey and another Kitsap official responded in person when Sale and Gates reported on December 20 that a client under their care had a scratch and bruise on his leg. After personally investigating, Frey concluded that the injuries were caused by his wheelchair, and instructed Sale and Gates to repair it. On hearing from the client that he had asked to see a doctor about an unrelated stomach ailment, Frey also

arranged for him to see a doctor. (JA120,128;423,430-31,443,458,484,638-39,740-47,797-804.)

That afternoon, the Board notified Frey that the Union had filed a petition to represent a unit of Kitsap employees including direct caregivers and HOHs. The following day, Frey revisited the residence where Sale and Gates worked. He re-inspected the wheelchair, found it had not yet been repaired, and decided to fix it himself. Frey then placed Sale and Gates on administrative leave "pending further investigation" for not repairing the wheelchair sooner and not honoring the client's request for a doctor. Frey also referred the incident to the State of Washington for investigation. (JA120-21;492-93,725-26,805-06.)

Meanwhile, on January 4, the Board held a hearing on the Union's representation petition, which Gates attended as a union supporter. (JA120,126;481-82.)

On January 31, a state investigator contacted Frey for an initial interview regarding his allegations about Sale and Gates. The next day, before the State could complete its investigation and announce any findings, Frey discharged Sale and Gates, citing their failure to repair the wheelchair and tend to the client's request for a doctor. The State later closed its investigation, indicating "no violation was determined." (JA121;166-68,492,1343,1384,1390.)

C. Employees Vote for Union Representation; Kitsap Continues To Police Residential Conditions More Closely and Disciplines Hennings

The Board conducted a representation election among Kitsap's direct caregivers and HOHs in early 2012. After tallying the ballots on March 15 and announcing that a majority favored representation, the Board certified the Union as the employees' collective-bargaining representative. (JA124,134;200-02,218-19,506.)

As the Union took up its new role, Kitsap maintained its more frequent and closer inspections of facilities where its now-unionized employees worked. Kitsap also began documenting infractions as never before. On April 12, for example, Kitsap issued Hennings a formal written warning for being seven minutes late to work, even though it had previously tolerated more egregious instances of lateness and absence. On the date in question, Hennings came directly to work after a union meeting where she and several other employees were chosen as members of the Union's bargaining committee. (JA124-26,128;208,325-26,328-30,1345.)

D. The Union Attempts To Schedule Bargaining Sessions and Requests Information; Kitsap Stalls, Provides Only Limited Information, Reserves Sweeping Powers for Itself in Contract Proposals, and Pretermits Two Bargaining Sessions

On April 23, Union Chief Negotiator Sarah Clifthorne proposed a series of initial bargaining dates, but Kitsap's chief negotiator, Gary Lofland, said nothing

for nearly a month, despite her repeated emails and telephone calls. Lofland finally responded on May 21, saying he could meet on June 5 or 6, and asking the Union to bring its written contract proposal. The next day, Clifthorne told Lofland the Union was available on both dates and noted that it had selected five employees, including Hennings, to serve on its bargaining team. Clifthorne added that they would be trained on June 4, in time for the first meeting. (JA109;208,519,950-56.)

On June 1, the Union asked Kitsap to provide information about bargaining-unit employees and their terms and conditions of employment, to help inform upcoming negotiations. Lofland responded that Kitsap could not meet on June 5 or 6 after all. He blamed the Union for its one-day "delay in responding to the available dates," claiming they were not "realistic." He also alleged that the Union had failed to timely train its bargaining team, submit an information request, and develop a written proposal. (JA109;518-19,960-63.)

The Union trained its team on June 4, and the next day Clifthorne emailed Lofland again to schedule bargaining, proposing 26 possible dates between June and August. Lofland said he would schedule one date only, July 13. He refused to meet sooner. The Union accepted this date but continued to request additional ones. Lofland refused, but agreed to all-day bargaining sessions, from 9 a.m. to 5 p.m. (JA109-10&n.6;208,533,965-68.)

On June 11, Lofland partially responded to the Union's information request. Thereafter, the Union sent him its complete written proposal, per his request. (JA109-10;527-29.)

At the July 13 bargaining session, the Union explained its proposal. Kitsap asked no questions and made no proposals. Instead, it declared the parties "done for the day" well before noon and stayed only to schedule two additional bargaining sessions (August 6 and 15). (JA110;532-35,719-20,977-1049.)

A few days later, the Union made another information request seeking information about the HOH position, explaining that it needed the information because recent HOH job postings appeared to change the requirements for that position. (JA110;1051.)

At the next bargaining session on August 6, Kitsap discussed its contract proposal, which it had provided three days earlier. The proposal included a broad management-rights clause and a disciplinary procedure that gave management "sol[e]" discretion to determine "th[e] step to be utilized and the degree of discipline to be imposed." Regarding wages, Kitsap reserved the right to further reduce wage rates unilaterally, with 30-days' notice to the Union, based on changes to state-provided funding. Kitsap also proposed removing the HOH position from the bargaining unit entirely. (JA110&n8;220,536-43,547,1052-94.)

At noon, Kitsap prematurely called an end to negotiations. Before leaving, it agreed to one additional bargaining session (on September 17) beyond the upcoming August 15 session. (JA110;536-47.)

E. Kitsap Issues Hennings Two Letters of Direction and Abruptly Cancels the Parties' Third Bargaining Session

On August 10, a few days after the bargaining session where Hennings was on the union bargaining committee, Frey issued her a "letter of direction" based on observations he had made at the home where she worked. Frey's letter reprimanded her for purportedly writing down an assignment schedule, and "remind[ed]" her "that in sworn testimony" at the Board representation hearing HOHs "testified that they do not and have never scheduled staff." Frey did not cite any rule prohibiting HOHs from writing down a schedule, and at the representation hearing he testified that HOHs work "hand in hand" with Grice on scheduling. (JA125-26;333,915-17,1346.)

On August 13, Lofland said Kitsap could no longer meet for bargaining on August 15. He cited a state audit as his reason for the sudden cancellation. (JA110;220,1095.)

On August 15, Kitsap issued Hennings another letter of direction, this time for not completing monthly narratives about clients in her house, and not charting their medications. In the letter, Kitsap acknowledged that Hennings had completed three narratives that month but admonished her for not doing more. Kitsap also

asserted that the "trend" she set "seemed to…be followed by the rest of [her] Household as most of the narrative pages were empty for each of the clients." Kitsap additionally admonished Hennings for two instances in which she purportedly failed to record the reason for a medication error. (JA125;1347-48.)

Kitsap did not issue letters of direction or other discipline to the direct caregivers in the household, even though they had primary responsibility for administering and recording medications. Nor did Kitsap pursue those employees for their noted failure to complete client narratives. (JA125;340-44,361,930.)

F. Kitsap Curtails and Delays Scheduling More Bargaining Sessions; It Responds to Some Information Requests, But Refuses To Provide Other Information, Broadens Its Proposed Management-Rights Clause, and Continues To Issue More Discipline

At the parties' third bargaining session on September 17, the Union presented a modified proposal for discussion, but Kitsap refused to discuss certain items and again ended the session early, before noon. (JA110;548-50.)

Just before the parties' October 16 bargaining session, Kitsap partially responded to the Union's July information request regarding the HOH position. Kitsap also provided a modified contract proposal that included even more sweeping management-rights language that gave Kitsap unilateral control over changing employees' "compensation," including wages and benefits, based on

"fluctuations" in state funding levels. As under Kitsap's previous proposal, the Union would "only" receive 30-days' notice of changes. (JA111&n.11;1128-76.)

At the October 16 session, the parties discussed this and other aspects of Kitsap's proposal, as well as employee access to personnel records. When the Union suggested employees should be able to review their records, Frey responded: "[i]f people wanted more write-ups, they could have them, starting then." That day, Kitsap issued 10 written warnings to employees for failing to complete narratives. (JA111,128;551-54.)

Soon after, the Union tried to schedule additional sessions in November. Again, Lofland would not readily commit. On October 25, he told Clifthorne that he was "[d]ealing with a torn Achilles tendon" and would get back to her "soon." On October 29, having heard nothing, she again requested November bargaining dates. The Union also requested additional information for bargaining purposes, including an accounting of "total ISS dollars [i.e., payments from the State] paid to bargaining-unit members per month, including overtime." (JA111;1177-78.)

Nearly two weeks later, Kitsap said it could meet, but not until late-November. The parties ultimately agreed to meet on November 26 and December 18, although Kitsap flatly refused to provide information about payments from the State. (JA111-12;1179-81.)

At the November 26 session, Kitsap withdrew its proposal to remove HOHs from the bargaining unit. The parties signed a tentative agreement to include them in the unit. (JA111-12;564-65,1185.)

G. Kitsap Confronts Hennings About Union Activity; Lofland Cancels the Sole December Bargaining Session; Through Unresponsiveness and Unavailability, He Effectively Imposes a Three-Month Hiatus in Bargaining; Kitsap Places Hennings on Administrative Leave and Demotes Her

By mid-November, Kitsap had only met with the Union four times in the nearly eight months since its certification and cut three of those sessions short. To protest this foot-dragging, the Union organized a march to the home of Kitsap's owner in December. Although Hennings did not participate, Frey and Kitsap's owner confronted her about it. She denied involvement, but Frey said: "[y]ou're union, you're involved." (JA125,127;344-45,361.)

Lofland cancelled the December 18 bargaining session with one day's notice, saying he was "feeling ill." Although he promised to contact Clifthorne that week to reschedule, he never did so. On January 11, 2013, having heard nothing, Clifthorne told Lofland the Union was available for bargaining "every day" the last two weeks of January. Lofland responded—14 days later—that he could not meet until late February because of upcoming family surgeries and a Board hearing on unfair-labor-practice allegations against Kitsap. (JA112;1186-90.)

The Union agreed to meet in late February, as Lofland proposed, but also asked to meet sooner. Lofland refused, even after the unfair-labor-practice hearing was postponed. He also cancelled the planned late-February session, stating he "apparently [had] been summoned for jury duty during that period." Eventually, Lofland said he could commit to February 21 and March 11-12. (JA112;1293-98.)

Meanwhile, on February 4, Kitsap placed Hennings on administrative leave, citing the various disciplines issued to her in 2012. Two days later, Kitsap demoted her. (JA125,127;1349-53.)

The parties subsequently met on March 11-12 and April 4-5, 2013.[3] Although they reached tentative agreement on a number of issues, they remained far apart on significant issues, including compensation, benefits, leave, discipline, the grievance procedure, whether discharge would be at will or for cause, and the management-rights clause. Soon after the April 4 session, Kitsap reneged on its tentative agreement to include the HOH position in the unit, reverting to its proposal to eliminate the position. Kitsap offered to discuss the proposal all over again. (JA112;571,577-82,623,1300-41.)

[3] Clifthorne cancelled the previously agreed-to February 21 session. (JA112;1299.)

The parties held additional bargaining sessions with a federal mediator. Nevertheless, by the end of 2013, they still had not reached a collective-bargaining agreement. (JA112;580-82,623.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Ring and Members Pearce and McFerran) found that Kitsap violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily discharging Minor; placing Sale and Gates on administrative leave and discharging them; taking a series of adverse actions against Hennings, culminating in her demotion; and enforcing work rules more strictly in response to union organizing. The Board further found that Kitsap violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to meet and bargain with the Union at reasonable times; refusing to furnish or delaying the provision of requested information; and engaging in overall bad-faith bargaining for the entire first year of the parties' collective-bargaining relationship. (JA108-22,124-29.)

The Board's Order requires Kitsap to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires Kitsap to: offer Minor, Sale, Gates, and Hennings full reinstatement to their former jobs or

substantially equivalent positions; make them whole for any lost earnings and benefits resulting from the discrimination against them; rescind, in writing, its practice of enforcing disciplinary rules more strictly in response to employees' union activities; within 15 days of the Union's request, meet and bargain with the Union in good faith and at reasonable times; upon the Union's request, meet for a minimum of 15 hours per week, or on an alternative schedule to which the Union agrees; submit written bargaining progress reports every 15 days to the Board's Regional Office; and post a remedial notice.[4] (JA131-32.)

STANDARD OF REVIEW

This Court's review of Board decisions "is narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (internal quotation marks and citation omitted). The Board's unfair-labor-practice findings will be upheld unless they have no rational basis or are unsupported by substantial evidence. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also* 29 U.S.C. § 160(e). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017). Accordingly, the

[4] In light of Kitsap's bad-faith bargaining over the first year of the parties' relationship, the Board also granted a 12-month extension of the "certification year," in which the Union enjoys an irrebuttable presumption of continued majority support in the unit. (JA130&n.37.)

Court may not reject the Board's findings simply because other reasonable inferences may also be drawn. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1076 (D.C. Cir. 2016).

ARGUMENT SUMMARY

Substantial evidence supports the Board's findings that Kitsap discriminated against pro-union employees Minor, Sale, Gates, and Hennings. The suspicious timing of those actions, the lack of any consistently applied practice warranting such treatment, as well as Kitsap's disparately harsh treatment of pro-union employees, strongly support the Board's unlawful-motive finding. Moreover, Kitsap admittedly and unlawfully adopted a harsher overall approach to discipline—issuing many more disciplines than usual—in response to the union organizing campaign. The record therefore did not compel the Board to accept Kitsap's defenses that it would have taken the same actions against Minor, Sale, Gates, and Hennings regardless of their union activity.

Kitsap's attempt to escape its remedial obligation to those employees fails. Kitsap's actions cannot be deemed for-cause under the Act, given the Board's unassailable finding of Kitsap's unlawful motive and its failure to prove it would have taken the same actions regardless of union activity. Similarly, Kitsap cannot establish that the employees were unfit for service, given its retention of employees who engaged in worse conduct, including intentional client abuse.

Substantial evidence further supports the Board's findings that Kitsap failed to comply with its statutory obligation to meet with the Union and confer about a collective-bargaining agreement at reasonable times. Kitsap slowed bargaining by repeatedly withholding any response to the Union's meeting requests, claiming unavailability for long periods, and cutting scheduled sessions short. Meanwhile, it also hamstrung bargaining by refusing to provide or delaying information requested by the Union for bargaining purposes; indeed, Kitsap has waived any challenge to all but one of those violations. And it engaged in regressive tactics, such as tentatively agreeing to include HOHs in the bargaining unit, then reneging months later.

Based on this conduct, the Board reasonably found that Kitsap acted in overall bad faith, without a sincere purpose to achieve a collective-bargaining agreement. Kitsap's substantive proposals only bolster the finding of bad faith, as Kitsap sought unilateral control over all critical aspects of the employment relationship, effectively relegating the Union to a minor role and leaving employees worse off than if they had no contract at all.

Given this egregious bargaining conduct, the Board acted well within its discretion in ordering Kitsap to bargain for 15 hours per week and to provide periodic progress reports. The Court lacks jurisdiction to address its baseless challenges to those remedies because Kitsap failed to raise them below. The Court

also lacks jurisdiction to consider Kitsap's challenge to the General Counsel's ratification of the unfair-labor-practice complaint and its continued prosecution, given Kitsap's failure to raise its claim before the Board.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT KITSAP VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATING AGAINST FOUR PRO-UNION EMPLOYEES, AND BY MORE STRICTLY ENFORCING WORK RULES IN RESPONSE TO UNION ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Retaliating Against Employees' Union Activity

Section 7 of the Act guarantees to employees "the right to self-organization, to form, join, or assist labor organizations," and to "bargain collectively through representatives of their own choosing…." 29 U.S.C. § 157. Section 8(a)(3) of the Act enforces these rights by making it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to…discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).[5] Thus, an employer violates Section 8(a)(3) "by taking an adverse

[5] A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]." 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

employment action, such as issuing a disciplinary warning, in order to discourage union activity." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In determining whether an employer has taken an adverse action because of union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135-36 (D.C. Cir. 2003) (emphasis omitted). Consistent with that test, if substantial evidence supports the Board's finding that protected activity was a "motivating factor" in the employer's adverse employment action, it is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected conduct.[6] *Transp. Mgmt.*, 462 U.S. at 401-03; *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993).

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[6] Kitsap quibbles about the "element[s]" of the General Counsel's *Wright Line* burden before the Board, claiming he must specifically prove a "nexus" between protected activity and adverse action. (Br.20-21.) Kitsap's assertions have no bearing on the question before the Court, which is whether substantial evidence supports the Board's finding of unlawful motivation and its rejection of Kitsap's affirmative defense. Accordingly, the Court need not address Kitsap's claims. In any event, the General Counsel may meet his burden of proving unlawful motivation with circumstantial evidence, and *Wright Line* does not require him to "'demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action.'" (JA118&n.25, quoting *Libertyville Toyota*, 360 NLRB 1298, 1301 n.10 (2014), *enforced sub nom. AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).)

"As direct evidence of employer motivation is generally scarce,…'circumstantial evidence alone may establish unlawful motivation.'" *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988) (citation omitted). Such evidence includes the employer's knowledge of and hostility toward protected activity, the timing of its action, and "'the absence of any legitimate basis for an action'—i.e., the absence of a credible explanation from the employer" or its shifting reasons. *Southwest Merchandising*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB 1083, 1088 n.12 (1980)). Ultimately, because motive is a question of fact implicating the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

B. Bonnie Minor

1. Minor's union activity was a motivating factor in her sudden discharge

On December 7, 2011, Kitsap discharged Minor, a pro-union employee with no disciplinary record, just hours after she spoke up at an anti-union meeting conducted by Kitsap's labor consultant. Substantial evidence supports the Board's finding that her protected activity was a motivating factor in her sudden discharge.

Minor became active in the union campaign in early December. It is undisputed that during the mandatory meeting on December 7, she put the labor consultant on the spot by asking him how much Kitsap was paying him. Given

this undisputed evidence, the Board reasonably inferred that Kitsap would have known about Minor's pro-union stance before discharging her. (JA119;642.)

The highly suspicious timing of Minor's discharge also shows that her pro-union conduct at the mandatory meeting prompted Kitsap's swift reaction. *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015) ("[t]iming alone may suggest antiunion animus" (internal quotation marks and citation omitted)). Thus, Kitsap discharged Minor within hours after she attempted to undermine its labor consultant. At the time, Minor had no prior history of discipline. (JA264.) Indeed, just one week before, she had received a strongly positive performance evaluation awarding her the highest possible rating in seven out of ten categories. (JA117&n.24;1355.) The Board reasonably found that Kitsap's precipitous discharge decision, soon after Minor openly challenged an anti-union speaker, and despite her recent positive evaluation and lack of any disciplinary record, showed that Kitsap's motive was to retaliate against her for supporting the Union. (JA119.)

As the Board further noted, its conclusion that Kitsap acted out of hostility towards Minor's union activity is only bolstered by its other conduct in this case. (JA119.) As shown below pp. 26-59, Kitsap amply demonstrated its animus in the months after Minor's discharge, by discharging or taking repeated adverse actions against other union supporters and engaging in bad-faith and dilatory bargaining

tactics. Contrary to Kitsap's claims (Br.27), the Board properly considered the entire record, including Kitsap's slew of subsequent unfair labor practices, in drawing an inference that Minor's discharge was unlawfully motivated. *See Continental Radiator Corp.*, 283 NLRB 234, 238 (1987) ("it would be fatuous to ignore" subsequent violations in assessing employer's motivation for discharge).

2. The record did not compel the Board to accept Kitsap's defense that it would have discharged Minor absent her union activity

Faced with this strong evidence of unlawful motive, it was incumbent on Kitsap to prove it would have discharged Minor even absent her union activity. Kitsap claims (Br.24-26), as it did below, that it discharged Minor for complaining to clients on the morning of December 7 that General Manager Frey had yelled at her about canceling a holiday party. The Board, however, was not compelled to accept Kitsap's claim. As the Board noted, although Frey and Human Resource Representative Grice told Minor right away that her complaints amounted to improper "triangulation," they "did not indicate any discipline would be forthcoming" or that it "was even being considered." (JA118.) Instead, it was not until after Minor spoke up at the anti-union meeting later that day that Frey and Grice hastily announced her discharge for "insubordination." (JA118.) This sequence of events seriously undermines Kitsap's assertion that "triangulation" was the real reason for its decision to discharge Minor.

As the Board also found, Kitsap failed to show it had a practice of immediately discharging employees for "counter-therapeutic" conduct, and it could not identify any instances of termination for such conduct. (JA119.) To the contrary, the record shows Kitsap tolerated even outright physical harm to clients by other employees, see below p. 28, making its position that it "had to" immediately discharge Minor for "triangulation" even more untenable.[7] (JA119,121.) *See Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (absence of evidence that employer discharged other employees for similar conduct supported finding of unlawful discrimination).

At bottom, as the Board explained, Kitsap cannot escape a finding of unlawful discrimination by simply pointing to a possible non-discriminatory reason for its action. Rather, it had the burden of proving that it would have "discharged Minor for that reason even in the absence of [her] union activities." (JA120.) The Board reasonably found that Kitsap failed to meet that burden, given the undisputed fact that initially it did not even mention the prospect of discipline and

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[7] This disparate-treatment evidence also negates Kitsap's claim that it acted on a "good faith belief" that Minor's misconduct warranted discharge. (Br.26.) *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016) (reasonable-belief defense fails if employer cannot prove it "parceled out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred").

only decided on discharge after Minor questioned its labor consultant, as well as its tolerance of outright physical abuse by other employees.

C. Alicia Sale and Hannah Gates

1. Their union activity was a motivating factor in Kitsap's placing them on administrative leave and discharging them

A few weeks after discharging Minor, and days after the Union petitioned to represent Kitsap's employees, Kitsap acted against two more prominent union supporters: Alicia Sale and Hannah Gates. Kitsap first placed them on administrative leave, allegedly for neglecting a client and failing to follow instructions. Kitsap soon discharged them, despite an ongoing state inquiry into whether they had in fact done anything wrong. Substantial evidence supports the Board's finding that these actions were motivated by their union activity.

Sale and Gates were members of the union organizing committee and specifically identified as such in a flyer that General Manager Frey admitted seeing in mid-December 2011. (JA120,789-92,848,1596.) Accordingly, contrary to Kitsap's claims (Br.31), there is no question that they were known union activists by the second half of December, when the events at issue unfolded.

Moreover, the swift and highly suspicious chain of events shows that Kitsap acted out of hostility towards their union activity. On December 20, after they reported a scratch and bruise on a client's leg, Frey personally appeared at their

facility to investigate. He believed that the client's wheelchair was the cause and directed Sale and Gates to repair it. He also determined the client had asked to see a doctor about an unrelated issue and arranged for a doctor's visit. That afternoon, Frey learned that the Union had filed its representation petition.

The following day, he reappeared at the house, noted the wheelchair was not yet repaired, and placed Sale and Gates on administrative leave on December 23, citing their failure to make immediate repairs and faulting them for not honoring the client's request for a doctor. (JA120.) As the Board aptly noted, Kitsap put them on administrative leave less than 2 weeks after they appeared on the union flyer, and just 2 days after Kitsap received notice that the Union had garnered enough support for an election petition. (JA121.)

On February 1, 2012, Kitsap discharged both employees, despite a still-open state investigation into their conduct. As the Board found, the timing of these discharges only lends further suspicion to Kitsap's already suspect actions. (JA121.) Kitsap had no pressing need to discharge them before the investigation concluded, while they were on administrative leave and no longer working with clients—unless it simply wanted to shed union activists as soon as possible. (JA121.) Had Kitsap waited, it would have learned that the State found no wrongdoing.

Kitsap also treated Sale and Gates more harshly than other employees who engaged in similar, if not more egregious, misconduct. In December 2011, for example, Kitsap learned that employee Jackie Cavanaugh had "yelled at a client, pulled the client by her arms, put her knee into the client's side, and pushed the client's chair" in an apparent effort to impose a "timeout." (JA121;SA1-2.) As he did with Sale and Gates, Frey referred the matter to the State for investigation. But far from placing Cavanaugh on administrative leave and removing her from client contact, Frey kept her working, even with the very client she had apparently abused. Frey also did not discharge her prematurely before the State concluded its investigation.

Similarly, in August 2011 Kitsap learned that employee Gerry Goodman had "purposely injured a client's ankle." (JA121;SA3.) Kitsap responded by simply prohibiting him from interacting with that client alone, without taking further action, such as placing him on administrative leave or discharging him.

Thus, based on Kitsap's own records, the Board reasonably concluded that it inexplicably "treated Sale and Gates more harshly than Cavanaugh and Goodman," who engaged in "intentional abuse, including physical abuse." (JA121.) This disparate treatment "strongly support[s] an inference of unlawful motivation." (JA121.) *Accord Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264 (D.C. Cir. 1993). Further, there is no merit to Kitsap's passing suggestion that

Cavanaugh and Goodman were not appropriate "comparators" because they cared for less vulnerable clients. (Br.34.) Kitsap has provided no support for its suggestion and, in any event, it is mistaken that a finding of disparate treatment requires an absolute identity of attributes among comparators and discriminatees. *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987); *accord NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 788 (8th Cir. 2013) (the "similarly situated co-worker inquiry is a search for a substantially similar employee, not for a clone") (internal quotation marks and citations omitted).

2. The Board was not compelled to accept Kitsap's defense that it would have discharged Sale and Gates absent their union activity

As the Board aptly found, Kitsap offered no explanation for its disparately harsh treatment of Sale and Gates. (JA122.) Accordingly, Kitsap plainly failed to establish that it would have taken the same action even if they had not engaged in union activity.

In a misdirected effort to provide some justification for its actions, Kitsap now alleges that it had a "good faith belief that Sale and Gates engaged in misconduct." (Br.32.) But the Board did not disbelieve Kitsap's evidence that they engaged in the "neglect" attributed to them. (JA120.) On the contrary, it accepted that evidence as credited. (JA120.) Accordingly, it is irrelevant whether Kitsap believed the neglect occurred. *See Fort Dearborn Co. v. NLRB*, 827 F.3d

1067 (D.C. Cir. 2016) (reasonable-belief defense fails if employer cannot prove it "parceled out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred"). In sum, Kitsap failed to meet its burden of proving that it would have placed Sale and Gates on administrative leave and discharged them absent their union activity, and the Board was not compelled to find otherwise.

D. Lisa Hennings

Undisputed evidence establishes that Hennings was a member of the union organizing committee and participated in collective bargaining on the Union's behalf. Almost from the outset, her union activities were known to Kitsap. (Br.39.) Thus, in December 2011, her name appeared on a pro-union flyer that Frey received, and she directly told Frey she was "pro union," to which he responded, "I kind of figured that." (JA124,126.) Hennings was also present at the meeting where Board agents announced the vote tally.

Following Hennings' open involvement with the Union and the Union's successful bid to represent Kitsap's employees, Kitsap took a series of disciplinary actions against her. Among other things, Kitsap gave her a written warning for being seven minutes late to work after a union meeting; issued her "letters of direction" for engaging in scheduling, and for not completing certain records; and

placed her on administrative leave and demoted her.[8] As explained below, substantial evidence supports the Board's findings that Kitsap took these actions against Hennings because of her union activity, and thus violated Section 8(a)(3) and (1) of the Act.

1. April 12 warning for lateness

Kitsap gave Hennings a written warning on April 12 for being seven minutes late to work. As the Board found, the timing of this warning in relation to her union activity supports a finding of unlawful motivation. Hennings received the warning the same day she attended the union meeting where nominations for its bargaining committee were considered. Indeed, the meeting was the reason for her being 7 minutes late.[9] (JA126.)

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[8] Kitsap errs in citing its managers' testimony that letters of direction "were not considered disciplinary." (Br.40.) As a matter of law, documents relied upon in issuing further progressive discipline—whether called "directions," "warnings" or "counselings"—constitute adverse employment actions, because they have the potential to affect the timing and severity of later discipline. *Altercare of Wadsworth Ctr. for Rehab. & Nursing Care, Inc.*, 355 NLRB 565, 565 (2010); *see also Bellagio, LLC v. NLRB*, 854 F.3d 703, 709 (D.C. Cir. 2017) (adverse actions "reduce a worker's prospects for…continued employment, or worsen some legally cognizable term…of employment"). Here, Kitsap listed the letters as a basis for her demotion. (JA1558-1662.)

[9] The Court lacks jurisdiction to consider Kitsap's baseless claim, which it failed to raise below, that Hennings lost the protection of the Act because she chose to "linger at [a union meeting] despite the obligation to report for work." (Br.41-42.) *See* below p. 55.

Kitsap's disparately harsh treatment of Hennings also supports the Board's finding of unlawful motive. Other employees escaped discipline despite multiple or serious instances of tardiness and worse. For example, Kitsap issued no discipline to Manuel Gipson, even though he did not appear for work or call in for 9 days in 2005, falsely claimed he had worked certain days, and "offered a false medical excuse." (JA126;SA6.) Likewise, Kitsap issued no discipline to HOH Shirley Gallauher, even though she was consistently late to work by 5-15 minutes, multiple days a week, in 2006; and issued no discipline to Janice Henry, even though she was late almost every day for two weeks in 2007. (JA126;SA4,7.) Nor did Kitsap discipline Andie Rood in 2008, when she abandoned her shift without notifying Kitsap or making alternative arrangements for client care. (JA126;SA5.)

Before the Board, "Kitsap offered no explanation for this disparate treatment or any other evidence to show that it would have issued the April 12 warning even in the absence of Hennings' union activities." (JA126.) The Board accordingly found that Kitsap violated the Act by warning her for being 7 minutes late. (JA126.)

On review, Kitsap makes no attempt to explain its disparate treatment of Hennings as compared to other employees who were tardy without consequence before the union campaign began. Instead, Kitsap argues that the disparate treatment should be disregarded because it is "too distant in time." (Br.42.) But

Kitsap does not explain why that matters, nor does it provide any justification for its apparent view that its previously lax treatment is irrelevant. Rather, Kitsap repeats its banal claim that comparators should be "similarly situated in all material aspects." (Br.42.) *See* above p. 29.

Kitsap does not undermine the strong evidence of disparate treatment by pointing to an incident where it warned a pro-union employee (Johnnie Driskell) who was late to work after a union meeting. (Br.42-43.) This after-the-fact event does not help Kitsap establish that, when it warned Hennings, its consistent practice was to issue a warning regardless of union affiliation. In any event, as Kitsap acknowledges (Br.42), Driskell's lateness caused Kitsap to incur overtime costs. By contrast, there is no evidence that Hennings' seven-minute delay resulted in overtime costs.

2. August 10 letter of direction for scheduling

Substantial evidence likewise supports the Board's finding that Kitsap unlawfully issued Hennings a letter of direction on August 10, 2012. Kitsap's knowledge of her union activism is undisputed: she openly discussed it with Frey in December 2011, and in May 2012, the Union announced her membership on its bargaining committee.

It is also undisputed that just weeks after the parties' first bargaining session in July 2012, Kitsap issued a letter of direction chastising her for engaging in

scheduling, even though Kitsap had no rule against it. Instead, the letter cited employees' representation hearing testimony as a basis for imposing discipline. Thus, on its face, the letter disciplined Hennings, not for violating rules, but for purportedly disregarding such testimony.

Below, Kitsap belatedly attempted to justify its letter of direction by asserting that it had a policy prohibiting HOHs from engaging in scheduling. (JA126.) However, the Board reasonably dismissed that assertion as false and therefore pretextual. *See Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016) (stated reasons are pretextual if false or not in fact relied upon). As the Board noted, "Frey admitted [] at the representation hearing…that HOHs work 'hand in hand' with Manager Grice regarding employee scheduling." (JA126.) Thus, its claim of a policy against HOH scheduling conflicts with Frey's own testimony. Given this contradiction, it was entirely reasonable for the Board to infer that Kitsap's true motive for issuing the letter of direction was her persistent union activity. (JA126.) *See Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 947 (D.C. Cir. 1999) (employer's faulty justification was "pretextual and intended to conceal [its] true [discriminatory] motive").

3. August 15 letter of direction for not completing narratives and charting

Days after issuing the unlawful August 10 letter, Kitsap issued Hennings another letter, this time for failing to write narratives about clients in her house and

to chart notes about their medications. In so doing, Kitsap again engaged in blatant disparate treatment. As Kitsap acknowledged in its letter, other employees in Hennings' house were also guilty of not completing narratives and medical charts. Yet Kitsap admittedly did not take any action against them. Given this obvious disparate treatment, which Kitsap did not attempt to explain or defend, the Board reasonably inferred that Kitsap singled Hennings out for disciplinary action because of its amply demonstrated hostility towards her union activity.

4. February 2013 administrative leave and demotion

In early February 2013, Kitsap placed Hennings on administrative leave and then demoted her, citing concerns about her work and expressly relying on the unlawful discipline discussed above. Consistent with settled law, the Board found that because Kitsap relied on its prior unlawful discipline of Hennings in issuing further discipline, its February 2013 administrative-leave and demotion decisions were likewise unlawful. (JA127, citing *Hays Corp.*, 334 NLRB 48, 50 (2001).) *Accord NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013).

Kitsap gains no ground by arguing it would have placed Hennings on administrative leave and demoted her regardless of her protected activity because she had a history of "poor performance and lack of judgment." (Br.35-38,43-44.) That history includes the unlawful disciplinary actions discussed above, where Kitsap inexplicably treated Hennings more harshly than other employees, and

incidents that overtly manifested Kitsap's hostility to her union activity. For example, General Manager Frey accused Hennings of having some role in an employee demonstration outside the home of Kitsap's owner, telling her that because she was "union," she was "involved." (JA127.) In sum, considering Kitsap's history of unlawful conduct towards Hennings and other pro-union employees, the Board reasonably rejected Kitsap's claim that it would have placed her on administrative leave and demoted her even if she had not engaged in union activity.

E. Stricter Enforcement of Work Rules

As the Board found and Kitsap does not dispute (Br.55-56), Kitsap's monitoring of employees, and the sheer number of disciplines it issued to them, increased dramatically after they began organizing. Thus, several employees testified that managers began showing up at their worksites more frequently after the Union's December 2011 organizing blitz and started inspecting their work and worksite more closely. (JA128;638-39.) Before the Union campaign, inspections were conducted mainly by coworkers, and focused on safety issues such as functioning smoke detectors; after the campaign, managers took over, and began delving into details such as the contents of logbooks and kitchen cabinets, "pull[ing] out every can and inspect[ing] every expiration date." (JA128;638-39,643-44.)

Predictably, management's closer and more frequent scrutiny led to the discovery of more "infractions." Kitsap, moreover, adopted a practice of punishing infractions that were not previously subject to discipline. For example, Kitsap began issuing written warnings when employees failed to complete narratives about their clients. Indeed, on the very day Frey warned the Union that if employees "wanted more write-ups, they could have them, starting [now]," Kitsap issued 10 such warnings, fulfilling his threat. (JA128.) More generally, Kitsap showed an inclination toward discipline unlike anything seen before the union campaign. Thus, in the first eight months after the Union's election, Kitsap issued 40 written disciplines *in addition to* the unlawful disciplines discussed above—admittedly "a sharp break from prior practice." (JA128.)

On review, Kitsap does not question this compelling evidence, nor does it challenge the settled principle that where "'the pattern of discipline after the commencement of union activity deviate[s] from the [prior] pattern,'" a discriminatory motive is established. (JA128, quoting *Jennie-O Foods*, 301 NLRB 305, 311 (1991).) Accordingly, Kitsap waived any challenge to the Board's finding, based on the timing of Kitsap's tectonic shift in disciplinary approach, that it began "more strictly enforcing its disciplinary rules because its employees supported the Union and engaged in union activities." (JA128.) *See Corson &*

Gruman Co. v. NLRB, 899 F.2d 47, 50 (D.C. Cir. 1990) (arguments not raised in opening briefs are waived).

As the Board also found, Kitsap failed to establish any defense to this finding of discrimination. It never showed that "'its increased discipline was motivated by considerations unrelated to its employees' union activities.'" (JA128, quoting *Jennie-O Foods*, 301 NLRB at 311.) On the contrary, Kitsap *admitted* in briefing below that there was little evidence of discipline before the Union arrived, and Frey acknowledged that Kitsap began documenting discipline because of the Union. (JA128;361-62.)

Trying to negate this admission, Kitsap claims that its change in disciplinary approach was motivated by concerns over a "possible" state audit. (Br.55.) But Kitsap fails to explain the highly suspicious timing of this supposed audit, which appears to coincide exactly with the union campaign. (JA128.) Likewise, Kitsap says nothing about the origin of its sudden concern about an audit, or why it would require an entirely new disciplinary approach. Kitsap, thus, provides no reason to disturb the Board's well-supported finding that it adopted a harsher disciplinary approach in response to union organizing.

Contrary to Kitsap's claim, the Board is not asking Kitsap to "disregard the employees' failure to perform." (Br.55.) The Board's Order simply requires Kitsap to cease and desist from "[e]nforcing its disciplinary rules more strictly than

in the past in retaliation for its employees' union activities or support," and to "rescind, in writing, its policy or practice of enforcing its disciplinary rules more strictly in retaliation" for such activities. (JA132.) Plainly, these remedial provisions allow Kitsap to address failures to perform on a non-discriminatory basis, just as it did before the Union entered the scene.

F. The Board Properly Exercised Its Discretion in Ordering Kitsap To Reinstate the Discriminatees with Backpay

Intent on avoiding its remedial obligations to Minor, Sale, Gates, and Hennings, Kitsap misguidedly argues that it discharged or demoted them "for cause" under Section 10(c) of the Act, and that they should be denied reinstatement because they are "unfit" for further service. (Br.28-30,35,43-44.) Section 10(c) authorizes the Board to order "affirmative action" to remedy unfair labor practices, including "reinstatement of employees with…backpay." 29 U.S.C. § 160(c). This is the conventional remedy for loss of employment caused by an unfair labor practice. *See Precoat Metals*, 341 NLRB 1137, 1138 (2004) (citing *Sheller-Globe Corp.*, 296 NLRB 116 (1989)); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). The Board's award of that remedy here follows settled precedent. (JA131-32.)

The Court should reject Kitsap's argument that this standard remedy would run counter to a caveat in Section 10(c), that the Board may not award reinstatement or backpay to those who have been suspended or discharged "for

cause." 29 U.S.C. § 160(c). The argument disregards the Board's court-approved interpretation of the statutory term "for cause," which is entitled to judicial deference because the Board is interpreting an ambiguous provision of the statute it administers. *See Lechmere v. NLRB*, 502 U.S. 527, 536 (1992).

"[For] cause…effectively means the absence of a prohibited reason." *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007), *pet. for review denied sub nom. Brewers & Malsters, Local Union No. 6 v. NLRB*, 303 F. App'x 899 (D.C. Cir. 2008). *See NLRB v. Local Union No. 1229, Int'l B'hd. Of Elec. Workers*, 346 U.S. 464, 474 (1953) (for-cause discharge is discharge for reasons "other…than [unlawful] intimidation and coercion"); *Taracorp*, 273 NLRB 221, 222 n.8 (1984) (employer may "discharge for good cause, bad cause, or no cause at all," subject to "one specific, definite qualification; it may not discharge when the real motivating purpose is to do that which [the Act] forbids") (internal quotation and citations omitted). Accordingly, Kitsap cannot evade its remedial obligations by citing "causes" for its adverse actions that the Board specifically rejected in finding those actions unlawfully motivated. *See also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964) ("There is no indication…that [Section 10(c)] was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.").

There is no more merit to Kitsap's claim that Minor, Sale, Gates, and Hennings should be denied reinstatement because they are "unfit" for service. (Br.30-31,34-35,43-44.) Kitsap's claim rings hollow, given the evidence that it allowed other employees to keep their jobs even after they had committed more serious offenses like intentionally inflicting physical harm on clients. *See* p. 28 above. Although Kitsap notes the importance of "competent" healthcare professionals, it simply has not shown that, in its organization, the discriminatees' conduct automatically makes them incompetent and unworthy of continued employment. (Br.30,34,43-44, citing *NLRB v. Western Clinical Laboratory, Inc.*, 571 F.2d 457, 460-62 (9th Cir. 1978) (remanding to resolve conflicting evidence involving employee's basic competence to perform medical laboratory work).)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT KITSAP VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO MEET THE UNION AT REASONABLE TIMES, REFUSING TO PROVIDE AND DELAYING REQUESTED INFORMATION, AND BARGAINING IN OVERALL BAD FAITH

A. The Statutory Duty To Bargain Requires the Employer To Meet at Reasonable Times, Provide Relevant Information, and Engage in Negotiations With a Sincere Interest in Reaching Agreement

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to "bargain collectively" with the representatives of its employees.[10] 29 U.S.C. § 158(a)(5). In turn, Section 8(d) of the Act defines collective bargaining as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment…." 29 U.S.C. § 158(d).

These provisions impose on the employer a "positive legal duty to meet and confer with the [u]nion at reasonable times and intervals." *Calex Corp. v. NLRB*, 144 F.3d 904, 910 (6th Cir. 1998) (internal quotation marks and citation omitted). An employer that shirks or neglects this duty violates Section 8(a)(5) and (1) of the Act. *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 182-83 (2d Cir. 1998); *see also Lancaster Nissan, Inc. v. NLRB*, 233 F. App'x 100, 102-05 (3d Cir.

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[10] A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1). *See Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

2007) (upholding Board finding of violation where employer limited bargaining sessions to once or twice per month in first year after union's certification).

The statutory duty to bargain also "includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). Accordingly, an employer violates the Act by refusing to provide, or delaying providing, relevant information requested by its employees' union. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1251 (D.C. Cir. 2012).

At bottom, the statutory duty to bargain in good faith "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Ins. Agents' Union*, 361 U.S. 477, 485 (1960). Consequently, "the parties are obligated to do more than merely go through the formalities of negotiation." *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 47-48 (2d Cir. 1974). They must "make a sincere, serious effort to adjust differences and to reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). As a corollary, "[t]o conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement, would of course violate [Section] 8(a)(5) and amount to 'bad faith' bargaining." *Continental Ins.*, 495 F.2d at 48.

In assessing this issue, the Board considers "the totality of bargaining conduct." *Liquor Indus. Bargaining Grp.*, 333 NLRB 1219, 1220 (2001), *enforced*, 50 F. App'x 444 (D.C. Cir. 2002). That inquiry encompasses conduct "away from the bargaining table and at the table, including the substance of the proposals on which [the employer] has insisted." *Hydrotherm, Inc.*, 302 NLRB 990, 993 (1991). Ultimately, because "the drawing of inferences as to good or bad faith in the bargaining process is 'largely a matter for the Board's expertise' brought to bear on the particular facts before it," the Court is deferential in reviewing the Board's assessment. *Int'l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted); *accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 733-34 (D.C. Cir. 2015).

B. Kitsap Refused To Meet and Bargain at Reasonable Times

Substantial evidence supports the Board's finding that Kitsap breached its statutory bargaining obligation by failing "to meet at reasonable times" with its employees' chosen representative as Section 8(d) of the Act specifically requires. 29 U.S.C. § 158(d). To begin, although the Union proposed initial bargaining dates on April 23, 2012, Kitsap made no response for nearly one month, despite the Union's repeated emails and telephone calls. Moreover, when Kitsap's chief negotiator, Lofland, finally responded on May 21, he would only agree to meet on

one of the June dates proposed by the Union. He then rescinded his commitment just over a week later, for no legitimate reason.

Furthermore, as the Board found, Lofland sought to blame the Union for Kitsap's sudden cancelation, falsely claiming that the Union had "delay[ed] in responding to available dates." (JA112.) But plainly "[i]t was [Kitsap]—not the Union—that [had] waited almost one full month before agreeing to a date…which it then canceled." (JA112.) And although Lofland also tried to justify his cancelation by claiming the Union had not prepared its committee members for bargaining and had not submitted information requests and a complete written proposal, the Board reasonably found his assertions "baseless." As the Board explained, well before Lofland abruptly announced on June 1 that he was cancelling the June 5 session, the Union had confirmed that its bargaining committee would be trained beforehand. Moreover, contrary to Lofland's suggestion, the Union was not required to propound information requests and submit a complete written proposal before the first bargaining session.

Despite Kitsap's unreasonable refusal to meet as scheduled, the Union pressed on in its effort to schedule bargaining dates and acceded to Kitsap's demand for a proposal in advance of the first session. Although Kitsap eventually agreed to meet, it would not do so until July 13—almost three months from the Union's first scheduling request. Kitsap also rebuffed the Union's efforts to

schedule subsequent bargaining dates, rigidly adhering to its unreasonable refusal to schedule more than one date at a time.

Kitsap also hamstrung bargaining by repeatedly ending scheduled full-day sessions before noon and refusing to engage in substantive discussion of the Union's proposals. Indeed, at the very first bargaining session, Kitsap refused to discuss any aspect of the Union's proposal, even though the Union had provided it a week in advance, as Kitsap had requested.

Thanks to Kitsap's dilatory tactics, bargaining proceeded at a snail's pace through the fall of 2012, and consisted solely of once-a-month meetings, sometimes only for a half-day. In December 2012, Kitsap apparently tired of even this minimal routine and canceled its only scheduled bargaining session that month, with just one day's notice. And, as the Board found, "[a]lthough [Kitsap] promised that it would reach out to the Union to reschedule that session, it did not do so." (JA113.) "Only the Union made an effort to schedule additional sessions," but Kitsap successfully ignored its efforts until the end of January—"more than 5 weeks" after its last-minute cancelation of the December 18 session. Moreover, when Kitsap finally responded to the Union on January 25, it claimed inability to meet until February 21. Thus, "[b]ecause of [Kitsap's] continued dilatory conduct, almost 3 months elapsed between its proposed…session and the parties' previous meeting on November 26." (JA113.) In sum, given Kitsap's foot-dragging for

most of the first year after the Union's certification, the Board reasonably found that Kitsap failed to discharge its obligation to meet "at reasonable times" with the Union. 29 U.S.C.§ 158(d).

Kitsap attempts to excuse its delays by asserting that it had "legitimate reasons"—namely, Lofland's other commitments and physical injury. (Br.49.) However, as shown above, Lofland often gave no reason for his delays; he was simply unresponsive. Further, to the extent there were competing claims on his time, they provide "no defense" to the Section 8(a)(5) violation, as the Board found. (JA113n.14.) "[A]n employer's chosen negotiator is its agent for purposes of collective bargaining," and "if the negotiator causes delays in the negotiating process, the employer must bear the consequences." *Calex Corp. v. NLRB*, 144 F.3d 904, 910 (6th Cir. 1998).

C. The Court Should Summarily Enforce the Board's Uncontested Information-Request Violations; the Only Challenged Finding—that Kitsap Unlawfully Refused To Furnish Wage-Related Information—Is Supported by Substantial Evidence

In its opening brief, Kitsap does not contest the Board's finding (JA113-14) that it unlawfully delayed turning over certain information requested by the Union that was plainly relevant to fulfilling its duties as the employees' collective-bargaining representative. Specifically, the Board found, and Kitsap does not

dispute, that it waited three months or more before complying with the Union's request for:

- Employee schedules, house name, and shift information;
- Employee transfers, promotions, and movement in and out of the bargaining unit since December 11, 2011;
- Job descriptions and memos about job expectations;
- Memos or written materials on policies and procedures, rules, and guidelines for employees;
- History of wages and raises for employees for a five-year period;
- Training programs and requirements for staff, including all training records since December 1, 2011; and
- The job description for the HOH position.

Kitsap similarly does not question the Board's finding (JA114) that it entirely failed to provide copies of memos and job postings concerning the HOH position.

By failing to contest these Section 8(a)(5) violations in its opening brief, Kitsap has effectively waived any challenge to them on review. *See, e.g.*, *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 (D.C. Cir. 1990). Moreover, the Board is entitled to summary enforcement of the portions of its order corresponding to the uncontested violations. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011).

Turning to the single contested finding, the record and relevant precedent amply establish that Kitsap unlawfully refused to give the Union information about Kitsap's receipt of state funds for employee wages and overtime. As the Board found, Kitsap made such funding an issue by stating, in proposed clauses on management rights and compensation, that it reserved the right to modify compensation, including benefits, based on "fluctuations" in state reimbursement rates. Understandably, the Union sought some context for Kitsap's position, as well as concrete information about how state funding affects wages and benefits. The Union, thus, asked Kitsap to provide the monthly reimbursement rate for each employee beginning in March 2012.

The Board reasonably found that the requested information was relevant and therefore should have been produced. As the Board explained, "[w]here an employer adopts bargaining positions that make certain financial information relevant, the union is entitled to that information in order 'to evaluate and verify the [employer's] assertions and develop its own bargaining positions.'" (JA114, quoting *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).) Here, the requested information about state reimbursement rates would not only have given context to Kitsap's asserted need to reserve the right to change wages and benefits; it also would have informed discussions about what wage rates should be at the outset. As the Board noted, the parties' differences over wage rates made information

about state reimbursement particularly relevant because it "would have aided the Union in determining whether [Kitsap] had any room for potential movement on wage rates—a crucially important bargaining subject—based on current appropriations" and the recent pattern of appropriations.[11] (JA114.)

D. The Board Reasonably Found that Kitsap Bargained in Overall Bad Faith

The record amply supports the Board's finding that "the totality of [Kitsap's] conduct during negotiations demonstrates that it engaged in bad-faith bargaining." (JA114-15.) To begin, Kitsap "exhibited bad faith by engaging in dilatory tactics," which, as shown above, "began almost immediately after the Union's certification and persisted throughout negotiations." (JA115.) Kitsap further demonstrated bad faith by "outright refus[ing] to provide information concerning State payments." (JA115.) That refusal, in turn, undermined "the Union's ability to meaningfully bargain over wages and benefits, perhaps the most critical of all mandatory subjects of bargaining." (JA115.) Kitsap also hobbled negotiations, and again exhibited bad faith, by delaying provision of basic requested information "critical

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[11] The fact that Kitsap did not assert "inability to pay" does not relieve its obligation to produce financial information plainly relevant to informed discussion of its bargaining proposals. (Br.52-54.) *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Likewise, there is no merit to Kitsap's exaggerated claim that the Union's request for targeted information about Kitsap's use of state funding was tantamount to a request for a full financial audit. (Br.53-54.)

to the Union's ability to formulate proposals and engage in meaningful bargaining." (JA115.)

But Kitsap did not stop there. It also engaged in regressive bargaining that showed it "was not serious about coming to an agreement and would…walk back proposals so as to frustrate the Union and delay agreement." (JA115.) Specifically, after seeking removal of the HOH position from the bargaining unit, Kitsap tentatively agreed to keep it in, but then reversed course again without explanation, asserting that HOHs should be excluded. As the Board found, this whiplash of "unexplained conduct concerning an issue so critical to collective bargaining—the composition of the bargaining unit—is inconsistent with a sincere willingness to reach agreement." (JA115.) *See Valley Central Emergency Veterinary Hosp.*, 349 NLRB 1126, 1127 (2007).

Given this compelling evidence, the Board reasonably concluded that "without more, [it] warrants a finding of overall bad-faith bargaining." (JA115.) As the Board found, however, additional evidence demonstrates Kitsap's bad faith—namely, its scorched-earth bargaining proposals, which effectively "'exclude[ed] [the Union] from any participation in decisions affecting important conditions of employment,'" and thus would have severely undercut the Union's role as the employees' representative. (JA115-16, quoting *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859 (1982) (internal quotations omitted),

enforced, 732 F.2d 872 (11th Cir. 1984).) Indeed, these proposals would have left employees and their union "with substantially fewer rights and less protections than provided by law without a contract." (JA113, citing *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487-88 (2001), *enforced*, 318 F.3d 1173 (10th Cir. 2003).)

Thus, in its October 2012 proposal, Kitsap reserved the right to unilaterally reduce "rates paid" to employees "if the [State]…reduces the benchmark rate, the Legislature reduces funding, or changes to health care laws and contributions occur." (JA116.) In its proposed management rights clause, Kitsap repeated this language and made clear that its reservation of rights extended to increases and decreases in wages and benefits. Under the proposal, moreover, the Union would only have been entitled to notice of the unilateral changes, not to bargaining. Kitsap, thus, sought to deprive the Union of any ongoing role in determining these crucial bargaining subjects.

Kitsap likewise sought to deprive the Union of any role in discipline and discharge. Thus, although Kitsap's final proposal included a progressive disciplinary schedule, this was illusory because the proposal also insisted that Kitsap was not obliged to follow the schedule. Instead, Kitsap sought unilateral control over the disciplinary "step to be utilized and the degree of discipline to be imposed," keeping that "solely within…[its] judgment and discretion." (JA116.)

Kitsap's final proposal also provided for "at will" employment, meaning there were "no limits on [its] right to discharge unit employees," other than those imposed by law. (JA116.) Its proposed management-rights clause sought to expand Kitsap's authority further, reserving for Kitsap the "sole[] and exclusive[]" right to "promote, demote, suspend, discipline, layoff, or discharge employees." (JA116.)

Intensifying the sting of these proposals were others that sought to exclude the Union from its role in bargaining over work rules, and to eliminate any possibility of grievances if Kitsap invoked its extensive rights under the management-rights clause. As the Board found, Kitsap's exclusion of so-called management rights from the grievance procedure was particularly indicative of bad faith, given the breadth of those stated rights. In effect, Kitsap left employees and the Union with "no avenue to challenge any of [its] decisions with regard to the nearly exhaustive list of rights reserved to [Kitsap]." (JA116.) *See, e.g.*, *Regency Service Carts*, 345 NLRB 671, 722 (2005) (finding bad faith where employer's "extremely broad" management-rights proposal exempted management rights from grievance and arbitration procedure).

On this record, the Board reasonably found that Kitsap's proposals "taken as a whole" sought near obliteration of the Union's representative role in the very areas where employees would normally seek its help—in regard to wages, benefits,

discipline, and discharge. (JA115.) As the Board explained, Kitap's proposals "'would have so damaged the Union's ability to function as the employees' bargaining representative,'" that Kitsap "'could not seriously have expected meaningful collective bargaining.'" (JA116, quoting *PSO*, 334 NLRB at 489.) In short, Kitsap's proposals collectively support the Board's finding that it bargained without any serious commitment to reaching agreement. (JA115,117.)

Contrary to Kitsap (Br.44-49), the Board fully recognized that its role is not to "evaluate whether particular proposals are acceptable or unacceptable." (JA115.) Instead, the Board considered the proposals to determine whether, in the aggregate, they showed that Kitsap was not bargaining in good faith. The Board can consider the substance of employer proposals for that purpose; in doing so, it is not making pronouncements on the acceptability of particular proposals. *See NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187-88 (D.C. Cir. 1981) ("[i]n determining whether the company fulfilled [its] obligation [to bargain in good faith], the terms of its bargaining proposals may be examined"). Kitsap's effort to defend its individual proposals misses the point: the question here is whether the proposals "in combination…evidence[d] an intent not to reach agreement." (JA116.) The Board reasonably answered this question in the affirmative.

In focusing on its individual proposals, Kitsap also forgets that the Board's finding of bad faith rests, not only on their combined effect, but also on Kitsap's

other unlawful bargaining conduct—its dilatory tactics and regressive proposal, its failure to provide and delay in furnishing information needed for the Union to perform its representative function. *Accord PSO*, 334 NLRB at 489. Thus, ample evidence supports the Board's finding that Kitsap violated the Act by refusing to bargain in good faith.

E. Kitsap's Meritless Challenges to the Board's Remedial Order Are Not Properly Before the Court

Kitsap contests the Board's Order where it requires Kitsap to bargain with the Union "for a minimum of 15 hours per week," or on an alternative schedule to which the Union agrees, and to submit written progress reports to the Board's Regional Office every 15 days. (Br.57,JA131.) Because Kitsap did not challenge these remedies in a motion for reconsideration below, it cannot obtain judicial review of them here. *See* 29 U.S.C. § 160(e)) ("No objection that has not been urged before the Board…shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (Section 10(e) "bar[red]" argument that could have been raised in motion for reconsideration); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same).

In any event, the Board acted well within its broad discretion in tailoring its remedies to Kitsap's bargaining violations. *See Sure-Tan, Inc. v. NLRB*, 467 U.S.

883, 898-99 (1984) (Section 10(c) of the Act "vest[s] in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review"). Thus, the Board ordered a regular schedule of bargaining and periodic progress reports because Kitsap failed to honor its statutory duty to meet with the Union at regular times and bargain in good faith. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("the relation of remedy to policy is peculiarly a matter for administrative competence"). Kitsap cannot and does not show that such reasonable remedies keyed to the violations in this case constitute a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

III. KITSAP'S CHALLENGE TO THE GENERAL COUNSEL'S RATIFICATION OF THE COMPLAINT IS NOT PROPERLY BEFORE THE COURT

In a final effort to avoid liability, Kitsap suggests that the underlying complaint was unauthorized and remains so despite its ratification by General Counsel Griffin. (Br.14-16.) By Kitsap's own account, the question it would have the Court consider is "whether Griffin's ratification was appropriate and cured" an acknowledged defect (*see* above pp. 3-4) in the underlying complaint. (Br.15.) But Kitsap never raised that question, as it should have, in a motion for reconsideration of the Board's decision accepting the ratification and finding

Kitsap's previous challenge to the complaint moot. *See* cases cited above p. 55. The Court accordingly cannot consider Kitsap's newfound argument. 29 U.S.C. § 160(e); *see Oncor Elec. Delivery Co. LLC v. NLRB*, 887 F.3d 488, 500-01 (D.C. Cir. 2017) (review of General Counsel Griffin's ratification of complaint "blocked" by untimeliness of employer's objection).

In any event, Kitsap's cursory claims do not provide a basis for setting the ratification aside. Under this Court's precedent, a ratification is valid where "a properly appointed official has the power to conduct an independent evaluation of the merits and does so." *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotation marks and citations omitted). That is precisely what happened here. Following the Supreme Court's decision in *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015), Griffin—who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid—issued a notice stating that, "[a]fter appropriate review and consultation with [] staff," he had "decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." (JA108n.1.)[12]

[12] This Court recognized in *SW General* that the Board's General Counsel is one of only several officers expressly exempted from the FVRA's "void-ab-initio" and "no-ratification" provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e), and

Kitsap claims but does not prove, as it must, that the General Counsel "'failed to make a detached and considered judgment,'" and that it "suffered…'continuing prejudice from th[at] violation.'" *Wilkes-Barre*, 857 F.3d at 372 (quoting *FEC v. Legi-Tech*, 75 F.3d 704, 708-09 (D.C. Cir. 1996)). *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770-71 (D.C. Cir. 2012) ("strong presumption of regularity" applies to General Counsel's action); *1621 Route 22 West Operating Co., LLC v. NLRB*, 725 F. App'x 129, 137 (3d Cir. 2017) ("clear evidence" of irregularity needed to overcome "presumption of regularity" that applies to public official's action).

Accordingly, the Court should "take [the] ratification 'at face value and treat it as an adequate remedy.'" *Wilkes-Barre*, 857 F.3d at 372 (quoting *Legi-Tech*, 75 F.3d at 709) (upholding Board ratification of the appointment of a regional director originally appointed when the Board lacked a quorum, finding that the ratification "remedied any defect arising from the quorum violation"). Indeed, taking that approach, the Third Circuit has rejected a similar challenge to General Counsel

---

assuming that Sec. 3348(e) "renders the actions of an improperly serving Acting General Counsel *voidable*, not void") (original emphasis)). The Supreme Court acknowledged that proposition but did not address it because the issue was not presented, 137 S. Ct. at 938 n.2, and therefore it remains the law of this Circuit.

Griffin's ratification of a complaint issued initially by Acting General Counsel Solomon. *See 1621 Route 22*, 725 F. App'x at 137.[13]

[13] This Court is considering another complaint-ratification challenge in *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 18-1017 & 18-1049 (argued Nov. 16, 2018).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Kitsap's petition for review and enforcing the Board's Order in full.

/s/ Julie B. Broido
JULIE B. BROIDO
Supervisory Attorney

/s/ Milakshmi V. Rajapakse
MILAKSHMI V. RAJAPAKSE
Attorney

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Assistant General Counsel

National Labor Relations Board

February 2019

H:/Kitsap-final brief-jbmr

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	
Petitioner/Cross Respondent	)	Nos. 18-1187
	)	and 18-1217
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 12,784 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 19th day of February 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	
Petitioner/Cross Respondent	)	Nos. 18-1187
	)	and 18-1217
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 19th day of February 2019

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	Nos. 18-1187 & 18-1217
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	19-CA-074715, et al.
	)	
Respondent/Cross-Petitioner	)	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. §§ 151, et. seq.

Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, et. seq.

Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69 (2000):

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> ***
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the

same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

***

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been

suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

***

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Federal Vacancies Reform Act
5 U.S.C. §§ 3345, et. seq.

Section 3348. (a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and
(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

From:	Ring, John
To:	Ring, John
Subject:	FW: Invitation to Speak on May 10 and to Reception on May 9
Date:	Thursday, May 9, 2019 2:37:40 PM
Attachments:	Topics for NLRB Speakers.docx image001.png

From: Bashford, Jo Ann
Sent: Monday, April 29, 2019 11:33 AM
To: Ring, John <John.Ring@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
Subject: FW: Invitation to Speak on May 10 and to Reception on May 9

The attached is for May 10th.

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
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1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Denise Gold <goldd@agc.org>
Sent: Monday, April 29, 2019 11:30 AM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Good morning,

We're very much looking forward to seeing Chairman Ring at our program next Friday. We have now set the lunch session to begin at 12:20 and end at 1:30 p.m. (10 minutes earlier than previously stated). We will begin with the meal. Once the meal is winding down, hopefully around 12:45, we'll turn to the Chairman's remarks, followed by some time for Q&A. Please let me know if there are any concerns with that schedule.

To help the Chairman prepare, we have gathered some questions and topics of interest from the audience in advance. A copy of the list is attached for you to please pass along. While we don't necessarily expect him to address all everything on the list or only those topics listed, we hope that the Chairman will find this to be useful guidance. Please note that the list was created for both the Chairman and Alice Stock of the General Counsel's office, who is scheduled to speak earlier during an earlier session in our program (and will not be present during the lunch session), so some of the questions might be more geared toward the GC's office rather than to the Board chairman.

Topics/Questions for NLRB Guest Speakers

- Following the withdrawal of charges in *Loshaw Thermal Technology*, will there be another opportunity for the GC or Board to address the *Staunton Fuel* issue on whether specific language in an 8(f) prehire agreement is sufficient to confer 9(a) status?

- Is the GC or Board revisiting the adoption of contract theory, which at one time, following Deklewa, the Board said would not apply to 8(f) contracts? That was reversed in *ESP Concrete*. Further, if you have an 8(f) contract that has been timely terminated by an employer seeking to negotiate a successor agreement, will maintaining the status quo be turned against the employer under the adoption of contract theory since there is no obligation to do so? Does the employer violate the Act by maintaining the check-off of dues? It would not be a violation if the contract were 9(a).

- What can you tell us about the timeline for rulemaking on joint employer (final rule), RC election procedures, and off-duty access to property?

- Should we expect any new developments on joint employment and successorship?

- How about an update on the Alan Ritchey line of cases?

- Is the Board considering any significant cases involving project labor agreements? Note, e.g., the issues raised in the AGC of Washington ULP charge filed in Region 19 and the Dragados Flatiron ULP charge dismissed by Region 32.

- Any developments coming in regards to whether hiring hall registrants/referrals are "employees" for purposes of the Act, thereby requiring employers to bargain over terms and conditions that could apply to them (such as pre-employment drug testing)? While "applicants" are not employees under the Act, a 2005 GC Advisory Memo (*Cardi Corp., 37 NLRB AMR 21*) and some ALJ decisions say hiring hire registrants should be treated as "employees" under the Act, particularly under certain circumstances. So far, the Board itself has not addressed it.

- Any developments coming in regards to restrictions on an employer's economic weapons during a labor dispute, i.e., defensive vs. offensive lockouts following a ULP strike and/or while ULPs against the employer are pending?

- Will the Board revisit its bannering/inflatable rat/messaging cases? We hear that the GC is apparently sending these cases to Advice now. What are they looking to do with them? What are the ripe circumstances that will get the Board to move on bannering/inflatable messaging as coercive within the meaning of 8(b)(4)?

- A situation has arisen in the past where a construction company signs 9(a) agreement and, when it comes time to renegotiate, the union threatens to disclaim interest unless their terms are accepted. Disclaiming interest would probably trigger pension fund withdrawal liability, and the union knows it but claims that that was not their intent. Thoughts on developing guidelines for such a scenario?

- Multiemployer bargaining: Specifically, whether the bargaining unit work performed by some employers within the multiemployer unit can be attributed to other employers within the multiemployer unit who do not perform (or have the capacity to perform) that type of work for purposes of a union's "work preservation." Arguably, it should not because each employer's employees should be viewed in isolation, but there are GC Memos that suggest work by one employer could be attributed to others within the multiemployer unit.

- Additionally, whether the current Board/General Counsel agree with the Obama Board's decision in *Carr Finishing, 358 NLRB No. 165*, where the Board held that a union can enforce a multiemployer association's bylaws against an employer who did not timely submit a withdraw from multiemployer bargaining under the bylaws, but the notice would have been timely under the CBA. If they believe the decision was wrongly decided, is this something the General Counsel has directed the Regions to target in order to "correct" the law?

Thank you again for your assistance.

Denise

Denise Gold
Associate General Counsel
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Email: goldd@agc.org

From: Denise Gold
Sent: Wednesday, March 6, 2019 9:04 AM
To: 'Bashford, Jo Ann' <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Jo Ann,

Thank you very much for your assistance and to the Chairman for his acceptance and flexibility.

Best,
Denise Gold

From: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Sent: Wednesday, March 6, 2019 7:59 AM
To: Denise Gold <goldd@agc.org>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Good morning, Denise. This is to confirm that the Chairman has received full approval to speak at the symposium on May 10th and that he is happy to switch his presentation to the lunch slot at 12:30 to 1:30 pm.

If you have any questions for need any additional information, please let me know.

With best regards,

Jo Ann

Jo Ann Bashford
Confidential Assistant,
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From: Denise Gold <goldd@agc.org>
Sent: Tuesday, March 5, 2019 4:46 PM
To: Ring, John <John.Ring@nlrb.gov>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

John,

I just wanted to confirm with you that you received full approval to speak at our symposium on May 10. I sure hope there isn't any problem, as presentations from NLRB members have been a tradition for decades at this annual event, and we are very much looking forward to receiving a presentation from you!

Assuming you can confirm, I also wanted to ask if you would be able to switch your time slot. We currently have your session scheduled for 9:00-9:50 a.m. as noted in my original email below, but would like to move it to the lunch slot, which goes from 12:30 to 1:30 p.m., including lunch. If that's not feasible, though, we can certainly keep it at 9:00.

Again, thank you very much.

Denise

Denise S. Gold
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goldd@agc.org
Quality People. Quality Projects.

From: Denise Gold
Sent: Monday, November 19, 2018 9:53 AM
To: Ring, John <John.Ring@nlrb.gov>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

That's excellent news. I thank you and look forward to hearing back from you. Have a happy Thanksgiving!

Denise S. Gold
Associate General Counsel
Associated General Contractors of America

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goldd@agc.org
Quality People. Quality Projects.

From: Ring, John <John.Ring@nlrb.gov>
Sent: Sunday, November 18, 2018 5:21 PM
To: Denise Gold <goldd@agc.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Denise,
Thank you for the invitation. I would welcome the opportunity to speak to the AGC Labor and Employment Law Council in May. I am running this invitation through our normal approval process, although I don't anticipate any issues. We will let you know definitively once I have full approval. Thanks.

Regards,
John

John F. Ring
Chairman
National Labor Relations Board
1015 Half Street SE Washington, DC 20570
john.ring@nlrb.gov | 202-273-2722

From: Denise Gold [mailto:goldd@agc.org]
Sent: Thursday, November 15, 2018 10:25 AM
To: Ring, John <John.Ring@nlrb.gov>
Subject: Invitation to Speak on May 10 and to Reception on May 9

Dear John,

I'm reaching out to you again on behalf of the Associated General Contractors (AGC) Labor and Employment Law Council, this time to invite you to speak at the Council's 35th Annual Construction Labor Law Symposium. The symposium will take place on Friday, May 10, 2019, at The Fairmont Hotel, 2401 M St NW, Washington, DC. Presentations by NLRB members and general counsels have been a valuable part of our program for many years, and we would be honored if you would help us carry on that tradition.

We invite you to talk about substantive issues facing the NLRB that have relevance in the construction industry. The audience will be a sophisticated one, predominantly comprised of experienced labor lawyers along with some non-attorney labor relations professionals. We expect about 40-60 attendees. This far out, we have set only a preliminary schedule for the program, with

your session tentatively scheduled for 9:00 to 9:50 a.m., but we can certainly change the session time to accommodate your availability. The session timeframe includes time for your remarks plus some time for questions and answers.

For background, let me remind you that the Council is a group of distinguished labor and employment lawyers who represent AGC-member companies across the country and that AGC is the nation's leading trade association in the commercial construction industry, representing both open-shop and union employers in all sectors of the industry.

In addition, we again invite you to join us at a reception for symposium participants, government representatives, and other guests on the evening preceding the symposium, Thursday, May 9, from 5:30 to 7:00 p.m., also at The Fairmont.

I look forward to hearing from you and sincerely hope that we will have the privilege of your participation in our program. I can be reached by telephone at (703) 837-5326 or by e-mail at goldd@agc.org.

Thank you very much for considering this invitation.

Denise S. Gold
Associate General Counsel
Associated General Contractors of America
2300 Wilson Blvd., Suite 300
Arlington, VA 22201-3308
Direct: (703) 837-5326
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From:	Bashford, Jo Ann
To:	Ring, John
Subject:	FW: USLERN SPRING SESSION GUEST SPEAKER
Date:	Monday, May 6, 2019 7:02:16 AM
Attachments:	US LERN 2019 Spring Session Agenda.docx John Ring Bio.docx Meeting Participants List May 2019 (2) (2).docx

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John: Will you have any "formal" presentation to submit?

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Vines, Tomika <tomika.vines@mercer.com>
Sent: Friday, May 3, 2019 6:54 PM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: FW: USLERN SPRING SESSION GUEST SPEAKER

Hi Jo Ann,

Can you confirm if we can use the attached bio? Also, should I expect a presentation on Monday?

Kind Regards,

Tomika Vines
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From: Vines, Tomika
Sent: Wednesday, April 24, 2019 2:32 PM
To: 'John.Ring@nlrb.gov'

Cc: Bashford, Jo Ann
Subject: FW: USLERN SPRING SESSION GUEST SPEAKER

Chairman Ring,

I have attached the current Participants List. Please note: this list has not been finalized and is active.

Do not hesitate to let me know if I can be of further assistance.

Kind Regards,

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From: Vines, Tomika
Sent: Tuesday, April 23, 2019 9:25 AM
To: 'John.Ring@nlrb.gov'
Cc: Bashford, Jo Ann; Kachadoorian, Karen; Gavigan, Teresa
Subject: USLERN SPRING SESSION GUEST SPEAKER

Hello Chairman Ring,

We look forward to your presentation at the US LERN Spring Session. The session will take place at the Renaissance Chicago Downtown Hotel, 1 West Wacker Drive in Chicago. In preparation for the session, enclosed are the following:

1. Agenda
2. Meeting participants list to date

Please approve the attached bio or send me your bio to include with the meeting materials at your earliest convenience. If you will have a presentation to display at the session send it to me by end of day **Monday, May 6**. At that time, let me know if you have any special requirements (i.e., internet access to display videos, etc.). If you will be presenting a video it is recommended that you also bring the video on a USB in the event the firewall does not allow access to the website.

Note: If there are materials you would like to have produced for the session please send those to me

by end of day **Thursday, May 2.**

We typically share presentations after the session. If your presentation can be shared (in PDF) with members, please provide your approval when you send your document or indicate that you will provide a version for distribution.

If you have any questions do not hesitate to contact me.

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AGENDA

US Labor and Employee Relations Network
Renaissance Chicago Downtown Hotel, 1 West Wacker Drive, Chicago
May 9-10, 2019 Spring Session

Thursday, May 9

12:00 pm **Lunch and Networking**

12:45 **Welcome and Introductions**
Teresa Gavigan, Leader, US LERN and Karen Kachadoorian, Global Leader, Mercer Networks

12:55 **Insights from Jerry Dias: Responding to Trade Challenges and the Evolving Workplace**
Jerry Dias, President, Unifor
Mr. Dias, President of Canada's largest private sector union with 315,000+ members, will offer insights on the US-Mexico-Canada Trade Agreement, and explain ways in which Unifor is responding to the evolving workplace and drive for innovation.

1:45 **Union Organizing Campaigns under the Expedited Election Rules**
Mark Stubley, Shareholder, Ogletree Deakins, John Mitchell, VP, Labor Relations, Sysco and Michael Murphy, VP and Counsel, Labor Practice Group, Airgas
Mark will offer guidance and share experiences regarding union organizing campaigns since the Expedited Election rules were enacted in 2015. John and Mike will comment on recent campaigns in their respective companies.

2:45 **Break**

3:00 **NLRB Update – Developments, Current Initiatives and the Path Forward**
John Ring, Chairman, National Labor Relations Board
Chairman Ring will share insights regarding recent changes at the NLRB and the impact of these developments, as well as the Board's current labor initiatives and what to expect going forward.

4:00 **Negotiating Changes to Defined Benefit Plans – Lessons Learned at Mondelez and Johnson Controls**
Pamela DiStefano, Director, Labor Relations, Mondelez, Christopher Thom, Director, Labor Relations, Johnson Controls and Matt McDaniel, Partner, Mercer
Pam and Chris will discuss changes made to their respective defined benefit plans for unionized employees and explain their negotiating strategies, outcomes and lessons learned. Matt will moderate the discussion and highlight key considerations for employers considering changes to their plans.

5:00 **Adjourn**

6:00 **Dinner** – Haray Caray's Italian Steakhouse, 33 W Kinzie St, Chicago

Friday, May 10

7:30 am **Breakfast**

8:30 **Break-out Roundtable Discussions**
Members will share views on current Labor and Employee Relations challenges, recent LR initiatives and top issues raised by the unions at the bargaining table.

9:45 **Break**

10:00 **How Best to Deal with Absenteeism, ADA and FMLA Challenges**
Ivan Smith, Shareholder, Buchanan Ingersoll & Rooney
Ivan will discuss best practices for employers addressing the multiplicity of paid sick and family leave issues, as well as the interplay between the ADA and related federal and state policies.

10:45 **ArcelorMittal-USW Negotiations**
Patrick Parker, VP, Labor Relations, ArcelorMittal
Patrick will discuss ArcelorMittal's recent negotiations with the United Steelworkers Union and their four-year agreement. He will explain the industry backdrop and the challenges associated with tariffs, as well as the steel industry bargaining model and negotiated contract terms.

11:30 **General Motors' Corporate Responsibility Agenda – Doing Right for Employees**
Scott Sandefur, VP GMNA Labor Relations, General Motors
GM was recently recognized in the top 15 Companies 'Doing Right by America' by JUST Capital. Scott will discuss GM's global corporate responsibility philosophy and the impact on the employee experience for the unionized and non-unionized workforce. He will discuss the role the LR/ER team plays in setting and delivering the corporate responsibility agenda which supports human rights in the workplace, fair wage practices and overall "doing the right thing" across the globe.

12:00 pm **Adjourn/Lunch**

GUEST SPEAKER

JOHN F. RING

Chairman, National Labor Relations Board

April 12, 2018, President Donald J. Trump named John Ring Chairman of the National Labor Relations Board after being confirmed by the Senate on April 11, 2018. Mr. Ring was subsequently sworn in for a term ending on December 16, 2022.

Prior to his appointment to the NLRB, Mr. Ring served as a partner with the law firm Morgan Lewis. He has represented client interests in collective bargaining, employee benefits, litigation, counseling, and litigation avoidance strategies. He has an extensive background negotiating and administering collective bargaining agreements, most notably in the context of workforce restructuring and multiemployer bargaining. Mr. Ring received his J.D. and B.A. from Catholic University of America.

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MEETING PARTICIPANTS LIST

US Labor and Employee Relations Network
Renaissance Chicago Downtown Hotel, 1 West Wacker Drive, Chicago
May 9-10, 2019 Spring Session

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Speakers

Ivan Smith
Shareholder
Buchanan Ingersoll & Rooney

John Ring
Chairman
National Labor Relations Board

Mark Stubley
Shareholder
Ogletree, Deakins

Jerry Dias
President
Unifor

Mercer

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Matt McDaniel
Partner
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NOT FINAL

From: Ring, John
To: Lucy, Christine B.
Subject: Fwd: Bloomberg: Labor Board Restructuring Plan Includes Nationwide Demotions
Date: Wednesday, May 29, 2019 5:41:24 PM

(b) (5)

From: Martin, Andrew

Sent: Wednesday, May 29, 2019 4:17:52 PM

Subject: Bloomberg: Labor Board Restructuring Plan Includes Nationwide Demotions

Labor Board Restructuring Plan Includes Nationwide Demotions

- Plan will promote some admin staff, demote others
- Agency union moves to challenge planned action

By Hassan A. Kanu | May 29, 2019 04:13PM ET | Bloomberg Law

The heads of the National Labor Relations Board are planning a restructure of administrative staff at the agency's roughly 26 regional offices, including demoting employees in certain job classifications nationwide.

The plan would reclassify almost all NLRB administrative professionals as general "program support assistants," and place those employees into the same grade within the government's General Schedule pay system, according to a notice from the NLRB Union to members obtained by Bloomberg Law. The move means some of those employees would receive an effective promotion, although over half of the workers would be demoted, with many dropping from a GS 7 to a GS 6 classification.

The restructuring of board field offices comes as the agency's career staff continues to protest what they've called an unprecedented staffing crisis, and shortly after Congress signaled an intent to raise the agency's budget for the first time in six years.

Democratic politicians and many among the career staff have suggested that recent staff buyouts and other decisions by the NLRB's Republican members and general counsel are another way to accomplish a far-reaching overhaul of the agency after certain initialproposals received strong criticism. The NLRB adjudicates certain workplace disputes between workers, unions, and employers, and also administrates unionization elections.

The board has apparently pivoted from some of the earliest proposals by President Donald Trump's appointees to change how the agency operates, including a reported plan to consolidate regional offices and demote regional directors.

NLRB Chairman John Ring and top prosecutor Peter Robb have said that cuts and restructuring of staff and case procedures are necessary because of the NLRB's declining caseload and flat budget.
The agency declined to comment on the latest plans to reorganize administrative staffers.

Staff Opposed Move in Petition

The NLRB had about 1,320 full-time employees at the end of fiscal year 2018. It lost about 18% of its field office staff between fiscal years 2011 and 2017. Staffing losses grew by an additional 17% in "just the two short years" since Office of Management and Budget Director Mick Mulvaney issued a memorandum directing agency heads to reduce the size of the civilian federal workforce, the NLRB Union said in a recent letter to Congress.
The planned restructuring would affect roughly 100 workers in positions such as assistant to the regional director, docket clerk, case-processing assistant, and elections clerk.
The plan would effectively eliminate almost all of those positions and place employees who currently hold the posts into a new hybrid position at a GS 6 grade level. Agency heads have indicated that employees who are currently classified at a higher pay grade than GS 6 would retain their salary, according to the union's message to staff.
The plan includes training the new program support assistants to perform all the duties of the various other positions, the union said.
"The intent to demote GS 7s is extremely mean-spirited, at best, and we intend to make all efforts to either stop this from occurring, or, if we cannot legally accomplish that, to put in place as many protections as possible for those affected," Burt Pearlstone, president of the NLRB's field staff union, said in the message to members.
Roughly 90% of the agency's field staff signed a petition opposing leadership's plans for administrative workers, Pearlstone told Bloomberg Law May 29.
The NLRB is also dealing with attrition among some key staffers at the headquarters in Washington, D.C. The agency's congressional liaison recently left for a new opportunity, and its director of congressional and public affairs is planning to leave the NLRB this summer—which could leave the agency without a press shop for at least some time.
The latest restructuring plan won't affect the agency's "language specialists" or its "compliance assistants," who are responsible for ensuring that parties carry out the NLRB's orders and remedies after the members rule on a dispute.
To contact the reporter on this story: Hassan A. Kanu in Washington at hkanu@bloomberglaw.com
To contact the editors responsible for this story: Simon Nadel at snadel@bloomberglaw.com; Terence Hyland at thyland@bloomberglaw.com

From:	Lucy, Christine B.
To:	Ring, John
Subject:	Fwd: Presentation
Date:	Wednesday, May 8, 2019 12:39:59 PM
Attachments:	image001.png image002.png Labor Symposium.pdf

FYI - attached is the Labor Symposium deck for today's session. For your session, it's limited to the one slide at 45, with your bio photo and title.

Christine Lucy
Special Counsel and Chief of Staff
to the Chairman of the NLRB

Sent from my iPhone

From: Kalis, Sara B. <SKalis@littler.com>
Sent: Wednesday, May 8, 2019 8:56:19 AM
To: Lucy, Christine B.; Nolan-Needham, Amie
Cc: Broderick, David K.
Subject: Presentation

Just in case the powerpoint isn't going through, attached is the PDF. We will see you at 11 am in the siting area by the lobby.

Sara Kalis
Shareholder
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The presentation can be viewed on the mobile app under the session title:

Traditional Labor Symposium:

What Union and Nonunion Employers Need to Know About Today's Unions and Employer Obligations Under the NLRA

EXECUTIVE EMPLOYER

The presentation can be viewed on the mobile app under the session title:

Traditional Labor Symposium:

What Union and Nonunion Employers Need to Know About Today's Unions and Employer Obligations Under the NLRA

Joint Employer

Presented by

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AMIEE NOLAN NEEDHAM

Vice President- Associate General Counsel at AT&T

CHRISTINE LUCY

Special Counsel and Chief of Staff to the Chairman of the NLRB

Why do we care about Joint Employer?

- Joint liability for violations of federal labor law
- Duty to recognize and bargain with union representing employees of the joint employer
- Duty to provide company information to union representing employees of the joint employer
- Subject to picketing directed at joint employer

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Definitions

- "Employer" - Section 2(2): "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly…"
- "Employee" - Section 2(3): "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer…"
- Section 7 of the Act grants employees "the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…"
- Section 8 of the Act makes it an unfair labor practice for an employer to infringe on employees' Section 7 rights or refuse to bargain with employees' elected representatives.
- The Act does not contain the term "joint employer," much less define it.

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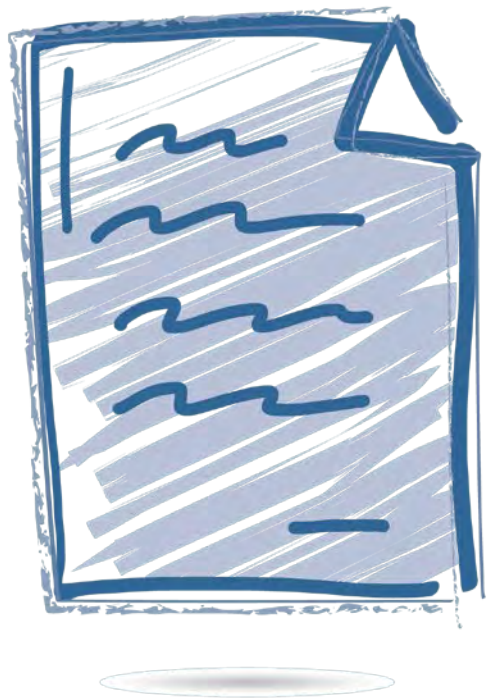
Browning-Ferris I - A Historical Perspective (Third Circuit, 1982)

- Separate business entities are joint employers if they each "exert significant control over the same employees" in that they "share or co-determine those matters governing essential terms and conditions of employment."
- Essential terms and conditions of employment include: the right to hire, fire, discipline, supervise and direct workers.
- Limited and routine supervisory instruction **insufficient** to establish joint employer relationship
- The NLRB adopted this test in *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transp. & Warehouse*, 269 NLRB 324 (1984).

Browning-Ferris II - “Joint Employer” Case (NLRB, 2015)

- Regional Director found BFI was NOT a joint employer with staffing agency.
- Staffing agency:
  - Provided pay and benefits
  - Handled recruiting, hiring, counseling, discipline, termination
  - Had on site supervisors supervising daily work
  - Scheduled employees, administered vacation and sick leave
- Does NOT share or determine essential terms and conditions of employment

Browning-Ferris II - “Joint Employer” Case (NLRB, 2015)



- The Board disagreed with the RD and found a joint employment relationship.
- Board substantially relaxed the requirements for proving a joint employer relationship.
- Board would no longer require proof that a putative joint employer has exercised any “direct and immediate” control over the essential working conditions of another company's workers.
- Under new standard, a company could be deemed a joint employer even if its “control” over the essential working conditions of another business's employees was indirect, limited and routine, or contractually reserved but never exercised.

The Board's Two-Prong Test

1. First, is there a common-law employment relationship with the employees in question?
2. Second, will the putative joint employer possess sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining?

- *What about the control?*
  - No longer need to both possess and exercise control. Nor does control have to be direct.
  - Instead, the Board would consider both reserved and indirect control as probative in the joint employer analysis.

Prong One

- Is there a common law relationship:
  - Extent of control may exercise under agreement
  - Distinct occupation or business; usually done by specialist without supervision; skill required
  - Who supplies instrumentalities, tools and place of work
  - Length of time employed
  - Method of payment by time or job
  - Parties' beliefs as to formation of employment relationship
- Right to control may be ATTENUATED

Prong Two

- Is there sufficient control over the essential terms and conditions of employment to permit meaningful collective bargaining?
- Essential terms (hiring, firing, discipline, supervision), and also wages and hours, number of workers supplied, scheduling, seniority, overtime, assigning work, and manner and method of work.
- Ways to control: collaborative decisions, total authority over different terms and conditions, affect different parts of same term, right to set the term.

BFI I vs. BFI II

BEFORE-PREDICTABLE TEST	AFTER-AMBIGUOUS TEST
Direct and immediate control over essential terms and conditions of employment: • Hiring • Firing • Discipline • Supervision and • Direction.	**Direct, indirect, and potential control:** • Is there a common law employment relationship? • If so, is there sufficient control over essential terms and conditions of employment to permit meaningful collective bargaining. • Fact based test decided on case-by-case basis.

Issues with Browning-Ferris II

- Under the relaxed standard it is difficult not only to correctly identify joint-employer relationships but also to determine the bargaining obligations of each employer within such relationships.
- Under the relaxed standard, an employer is only required to bargain over subjects that it controls (even if the control is merely indirect)

BFI II: The Aftermath

- Employer filed a Petition for Review to the D.C. Circuit Court of Appeals.
- While appeal pending, the NLRB decided *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), which overruled *BFI* and announced the following joint employer test:
  - Exercise ACTUAL joint control over essential terms and conditions of employment (not reserved)
  - Direct and immediate (not indirect)
  - Must NOT be limited and routine
- *Hy-Brand* vacated on a procedural issue in 2018.

Browning-Ferris III? - Remanded (D.C. Cir., 2018)

- NLRB asks D.C. Circuit to continue review of 2015 case.
- Court upheld conclusion that reserved authority to control and indirect control can be relevant factors in joint employer.
- HOWEVER, Court remanded case because Board:
  - Insufficiently explained what counts as "indirect" control; and
  - Failed to apply part of the test regarding which terms and conditions of employment qualify as essential for bargaining.

General Counsel's Reaction

- In the remanded *BFI* case (*BFI III*), the NLRB's General Counsel argues that the NLRB should not find that affiliated businesses jointly employ workers if one has only "indirect" or "reserved" control.
- Asks the NLRB to return to the former standard which required "direct" control.
- Argues that *BFI* makes "virtually all user employers, franchisors and subsidiaries" joint employers since they almost always reserve some control over shared workers' job conditions.

How Might *Browning Ferris (I, II, or III)* Impact Labor Relations?

- ✓ Neutrality Agreements – extend to suppliers?
- ✓ Unions will routinely file joint employer petitions to test concept
- ✓ Who decides the response message?
- ✓ Union corporate campaigns given new strength
- ✓ Joint bargaining with unions will be messy
- ✓ The secondary boycott issue

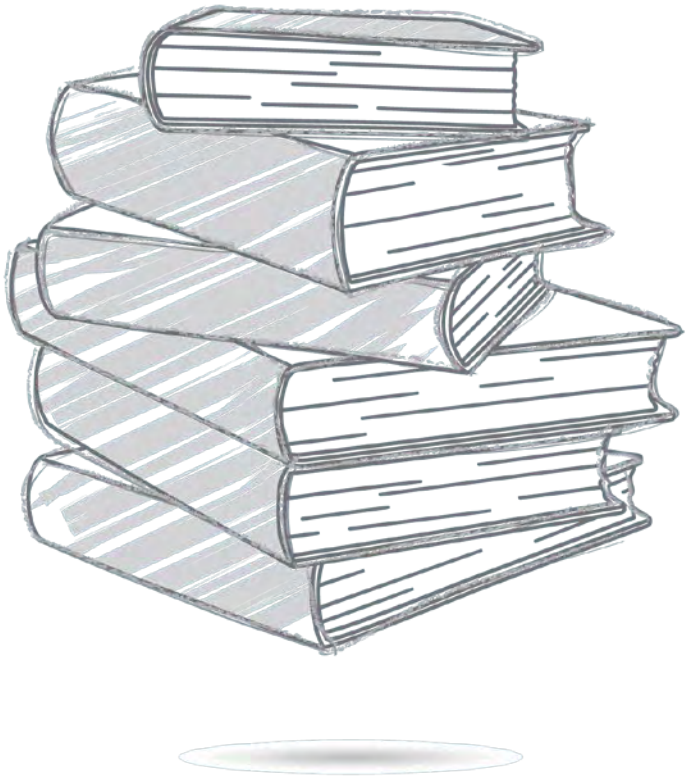
It’s Not Over: Rulemaking

- On May 9, 2018, while D.C. Circuit appeal was still pending, the NLRB announced its plan to undertake a rulemaking on the standard for joint employer status.
- Prospective only.
- Comment period closed on February 11, 2019.
- Nearly 30,000 comments submitted.

The Rulemaking Process

Proposed Rule

- Under the proposed regulation, an employer may be considered a joint employer of a separate employer's employees only if the two employers **share or codetermine** the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.
- To be deemed a joint employer under the proposed regulation, an employer must **possess and actually exercise substantial direct and immediate control** over the essential terms and conditions of employment of another employer's employees in a manner that is **not limited and routine**.



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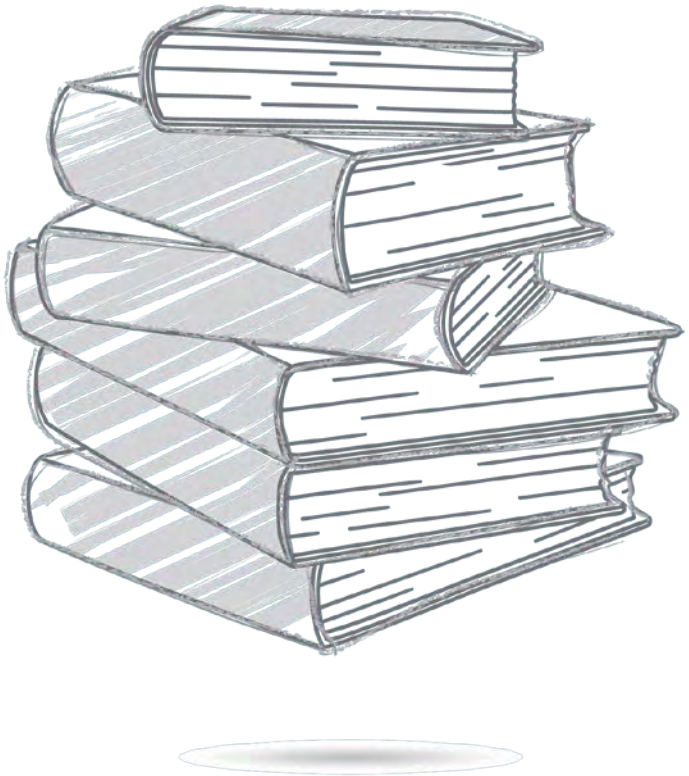
Our Prediction

- Even a putative joint employer's “direct and immediate” control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope.
- It will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope.

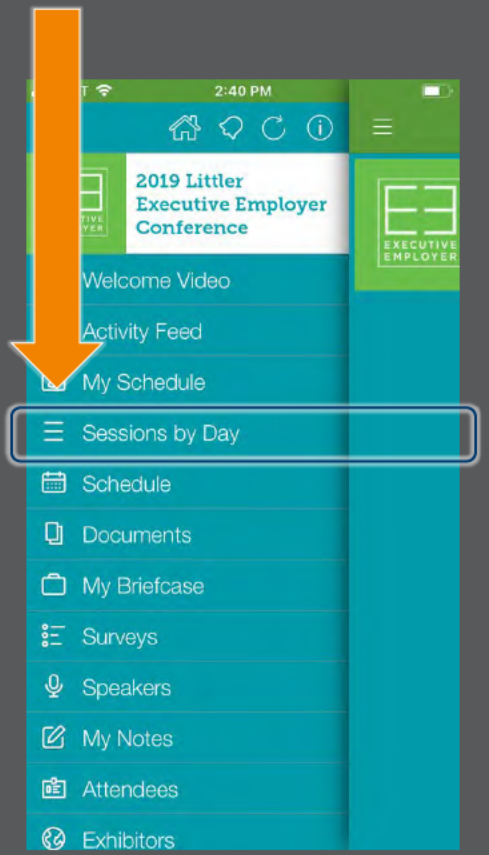


An Employer's Perspective

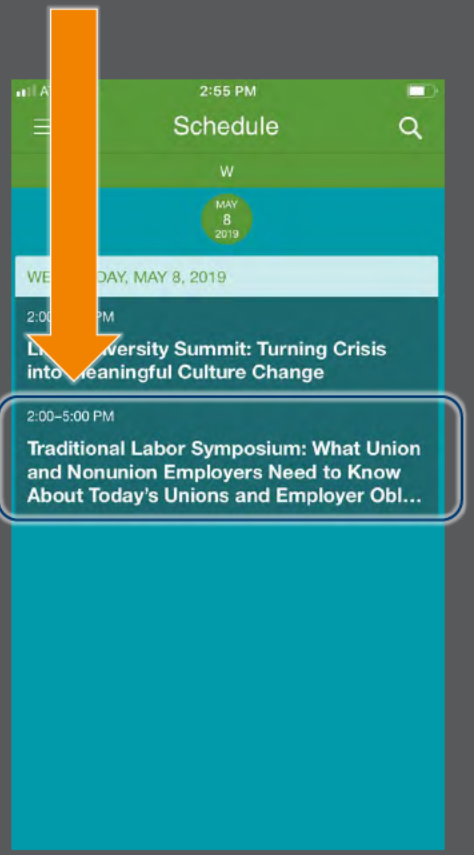
How to join session polling

1 Click on the three lines to access the menu

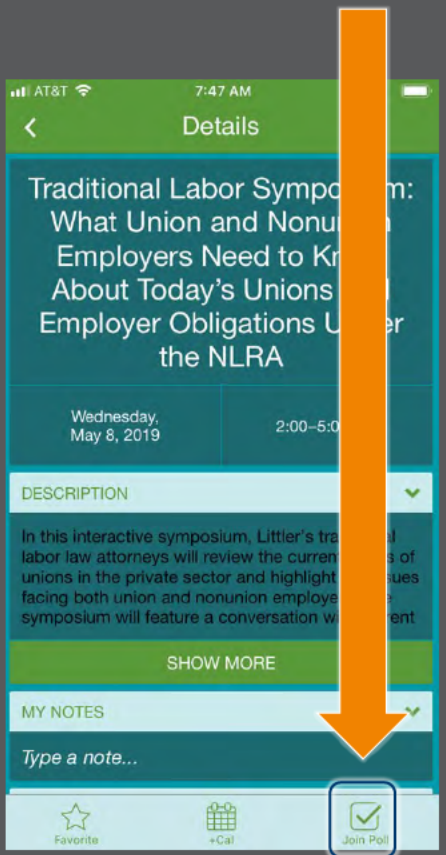
2 Select "Sessions by Day"



3 Select the session



4 Select "Join Poll"



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Joint Employer?

- Company A supplies labor to Company B. The business contract between Company A and Company B is a “cost plus” arrangement that establishes a maximum reimbursable labor expense while leaving Company A free to set the wages and benefits of its employees as it sees fit.
- Company B does not possess and has not exercised direct and immediate control over the employees' wage rates and benefits.

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Joint Employer?

- Company A supplies labor to Company B. The business contract between Company A and Company B establishes the wage rate that Company A must pay to its employees, leaving A without discretion to depart from the contractual rate.
- Company B has possessed and exercised direct and immediate control over the employees' wage rates.

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Joint Employer?

- Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. On-site managers employed by Company B regularly complain to A's supervisors about defective products coming off the assembly line. In response to those complaints and to remedy the deficiencies, Company A's supervisors decide to reassign employees and switch the order in which several tasks are performed.
- Company B has not exercised direct and immediate control over Company A's lineworkers' essential terms and conditions of employment.

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Joint Employer?

- Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers.
- Company B possesses and exercises direct and immediate control over Company A's line workers. The fact that Company B conveys its supervisory commands through Company A's supervisors rather than directly to Company A's line workers fails to negate the direct and immediate supervisory control.

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Joint Employer?

- Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee's store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations.
- Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees.

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Joint Employer?

- Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers.
- Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees.

Joint Employer?

- Temporary Staffing Agency supplies 8 nurses to Hospital to cover during temporary shortfall in staffing. Over time, Hospital hires other nurses as its own permanent employees. Each time Hospital hires its own permanent employee, it correspondingly requests fewer Agency-supplied temporary nurses.
- Hospital has not exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

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Joint Employer?

- Manufacturing Company contracts with Independent Trucking Company (“ITC”) to haul products from its assembly plants to distribution facilities. Manufacturing Company is the only customer of ITC. Unionized drivers—who are employees of ITC—seek increased wages during collective bargaining with ITC. In response, ITC asserts that it is unable to increase drivers' wages based on its current contract with Manufacturing Company. Manufacturing Company refuses ITC's request to increase its contract payments.
- Manufacturing Company has not exercised direct and immediate control over the drivers' terms and conditions of employment.

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Joint Employer?

- Business contract between Company and a Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. Company has never actually exercised its authority under this provision.
- Company has not exercised direct and immediate control over the Contractor's employees' terms and conditions of employment.

Examples

- Business contract between Company and Contractor reserves a right to Company to discipline Contractor's employees for misconduct or poor performance. User has not exercised this authority with the following exception. Contractor's employee engages in serious misconduct on Company's property, committing severe sexual harassment of a coworker. Company informs Contractor that offending employee will no longer be permitted on its premises.
- Company has not exercised direct and immediate control over offending employee's terms and conditions of employment in a manner that is not limited and routine.

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How to Avoid Liability:
What Agreements Should Include

- Agreement should state that the Service Contractor is the sole employer of its employees.
- Agreement should expressly state that the User Company does not dictate or control labor and employment matters for the Service Contractor and its employees.
- Agreement should place all hiring, discipline, and termination decisions over third party employees within the Service Contractor's exclusive discretion.
- Ideally, Agreement should set a contract price for the project, rather than provide reimbursement of Service Contractor's labor and training costs.
- Agreement should include a broad indemnification provision protecting against joint employer and NLRA liability.

How to Avoid Liability:
What Agreement Should Not Include

Under proposed rule the following can be in the agreement but you'd be better served to mean silent on the following:

- Discipline or evaluate Service Contractor employees.
- Reject or terminate Service Contractor employees for any reason.
- Set wage rates or wage rate minimums or maximums.
- Set working hours or control scheduling.
- Approve overtime.
- Set staffing levels.

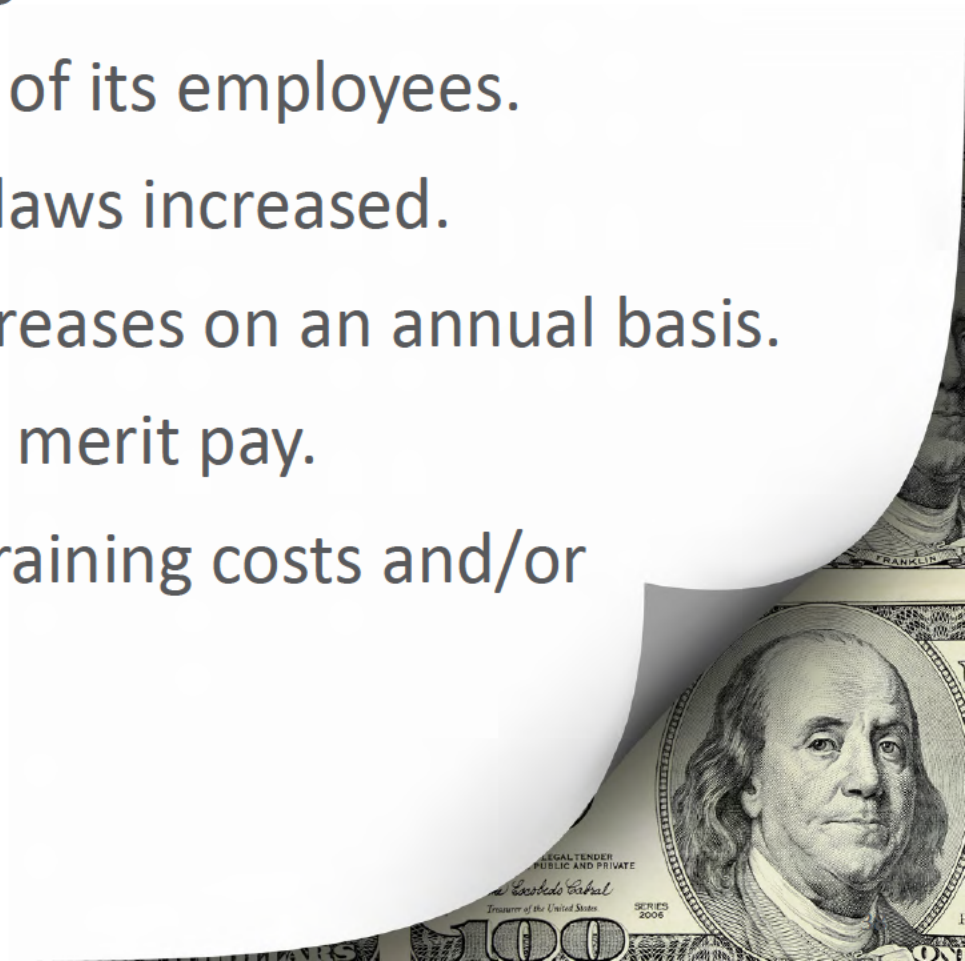
How to Avoid Liability:
What Agreement Should Not Include

- Assign work or reassign employees at its sole discretion.
- Determine the manner and method of work performance.
- Inspect and approve work.
- Require adherence to its personnel policies or employee handbooks.
- Set mandatory training policies, procedures or requirements.
- Require Service Contractor's employees to do work only for User Company.
- Audit books without cause or notice.

How to Avoid Liability:
Cost-Plus Labor Contracts

The following may support joint employer finding:

- If Service Contractor cannot exceed rate of pay of its employees.
- If Agreement adjusts up when minimum wage laws increased.
- If Agreement provides for percentage wage increases on an annual basis.
- If Agreement provides specified percentage for merit pay.
- If Agreement provides for reimbursement for training costs and/or equipment.



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How to Avoid Liability:
What You Should Do

- Limit direct interaction between User Company representatives and Service Contractor employees.
- Limit training to managers and supervisors of Service Contractor.
- Require Service Contractor to conduct all orientation and training of its own employees.
- Ensure that Service Contractor maintains its own labor and employment policies and those policies apply to its own employees.
- Require Service Contractor to provide direct, on-site supervision of its own employees.
- User Company should play no role in scheduling, assigning, disciplining, or terminating third party employees or in effectively recommending those actions.

How to Avoid Liability:
Hiring

- User Company should play no role in hiring or setting basic qualifications such as drug screening.
- User Company should not disqualify workers ineligible for rehire by User Company or who worked for competitors.
- User Company should not establish pay ranges for Contractor's employees.
- Service Contractor should not consult with User Company regarding wages.

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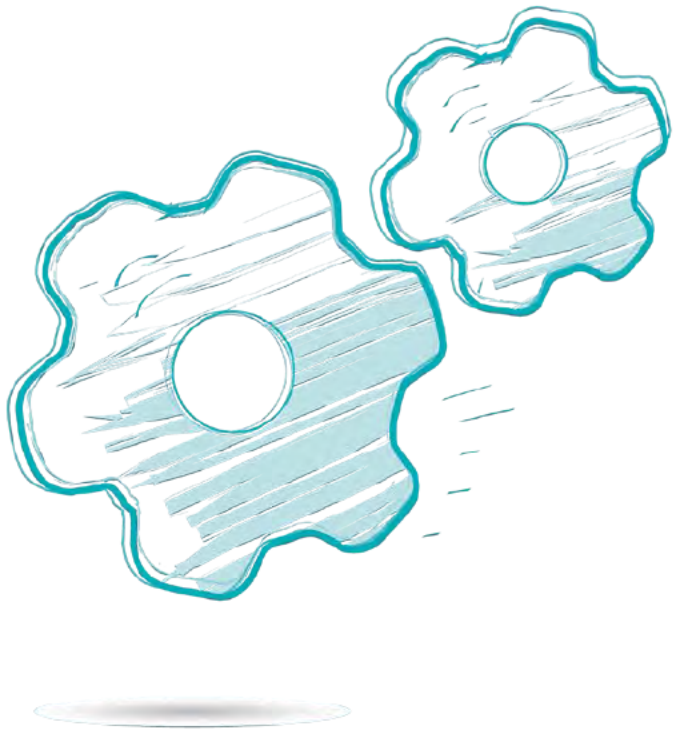
How to Avoid Liability:
Firing and Discipline



- User Company should not request dismissal or discipline of Service Contractor's employees with expectation that Service Contractor will abide by request.
- User Company should not remove employees or send employees home.

How to Avoid Liability:
Supervision

- User Company should not assign work to Service Contractor's employees and should not assign specific tasks for them to complete.
- User Company managers should not communicate work directions to Service Contractor's employees and should not counsel them about their work.
- User Company should not define full-time and part-time hour requirements for third party employees or sign off on time sheets for Service Contractor.
- User Company should not specify number of employees it requires.
- User Company should not set Service Contractor's hours of operation or shifts.

How to Avoid Liability:
Direction

- User Company should not hold out Service Contractor employees as its own.
- User Company should not establish safety rules and standards for Service Contractor employees.
- User Company should not train Service Contractor's employees.
- User Company should not require employees to follow rules or handbooks.

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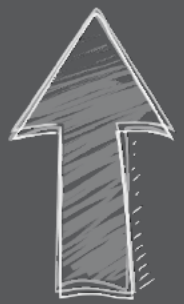
EXECUTIVE EMPLOYER

Littler

Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Discussion with

John Ring

Chairman of the National Labor Relations Board

Presented by

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Alternatives to Traditional Organizing: Social Media, UFO's, and Pro-Union Legislation.

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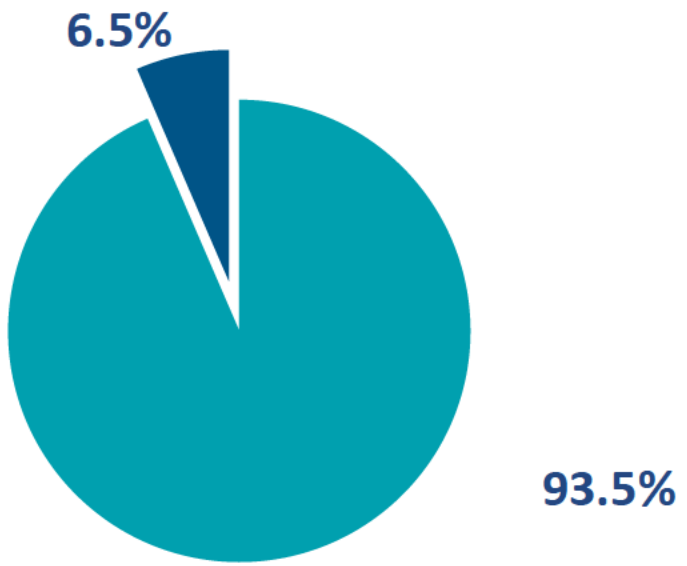
Private Sector Union Membership

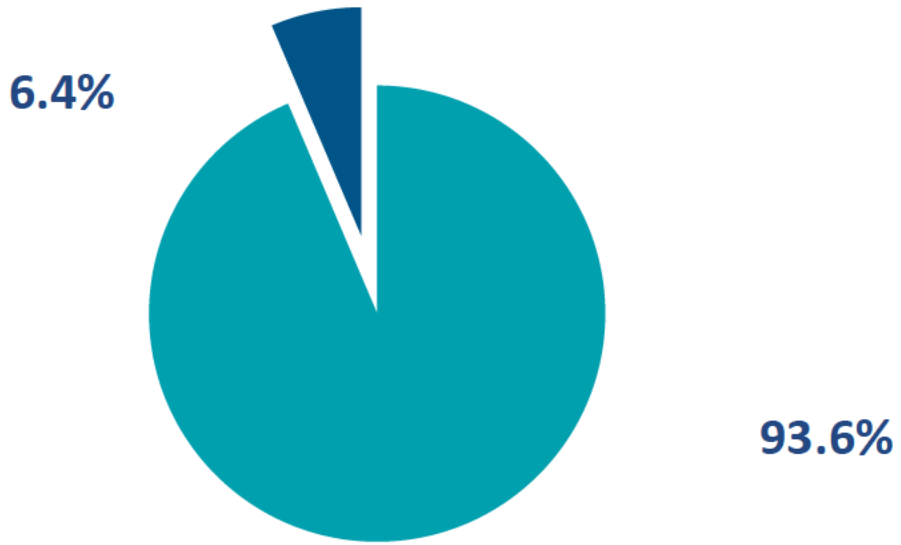
2017

Total union members: 8,490,900



2018

Total union members: 8,512,400



Union

Non-Union

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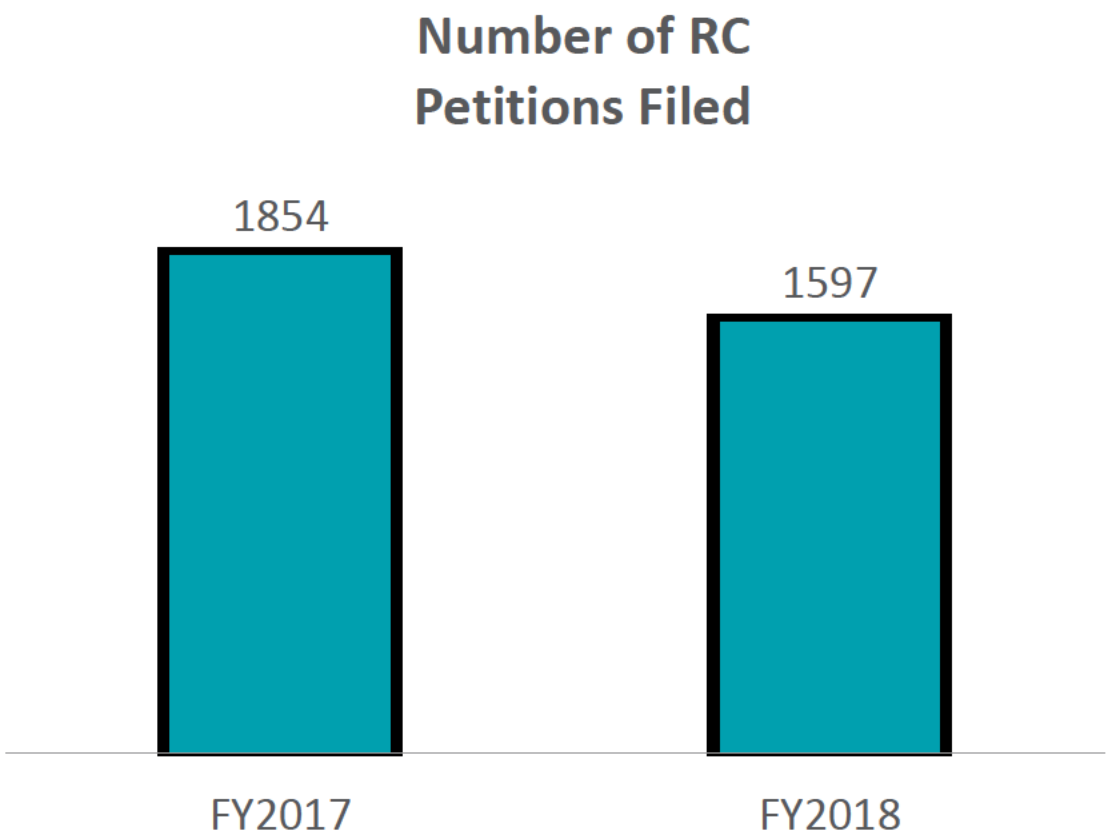
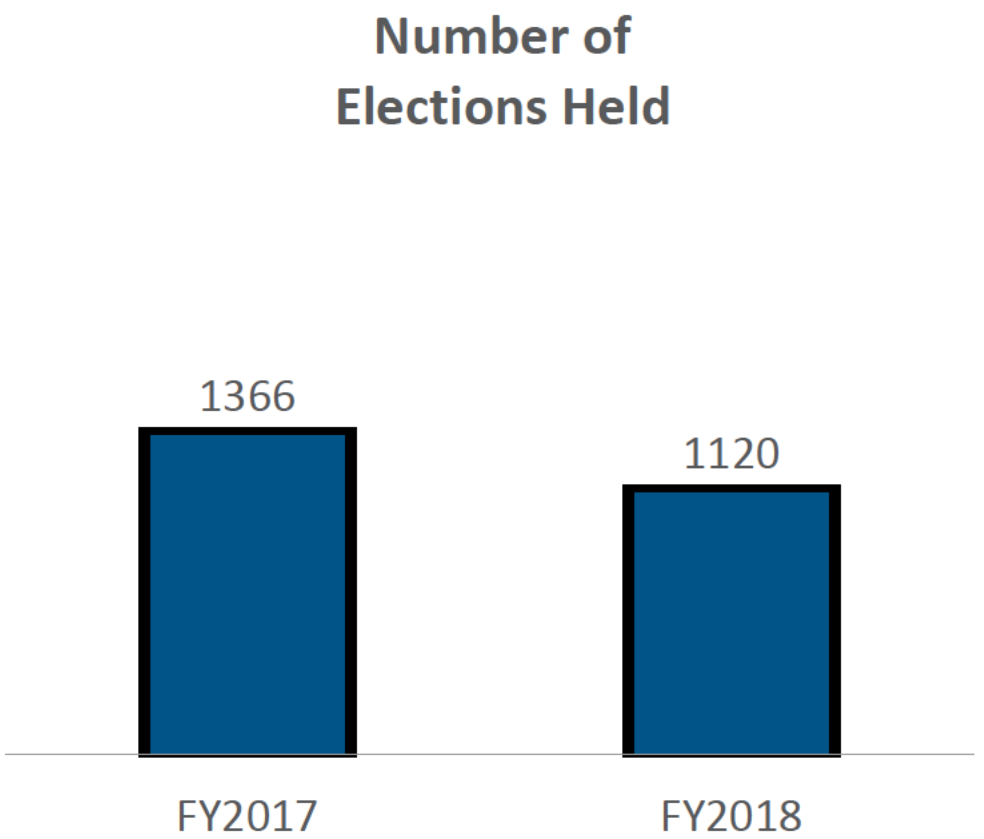
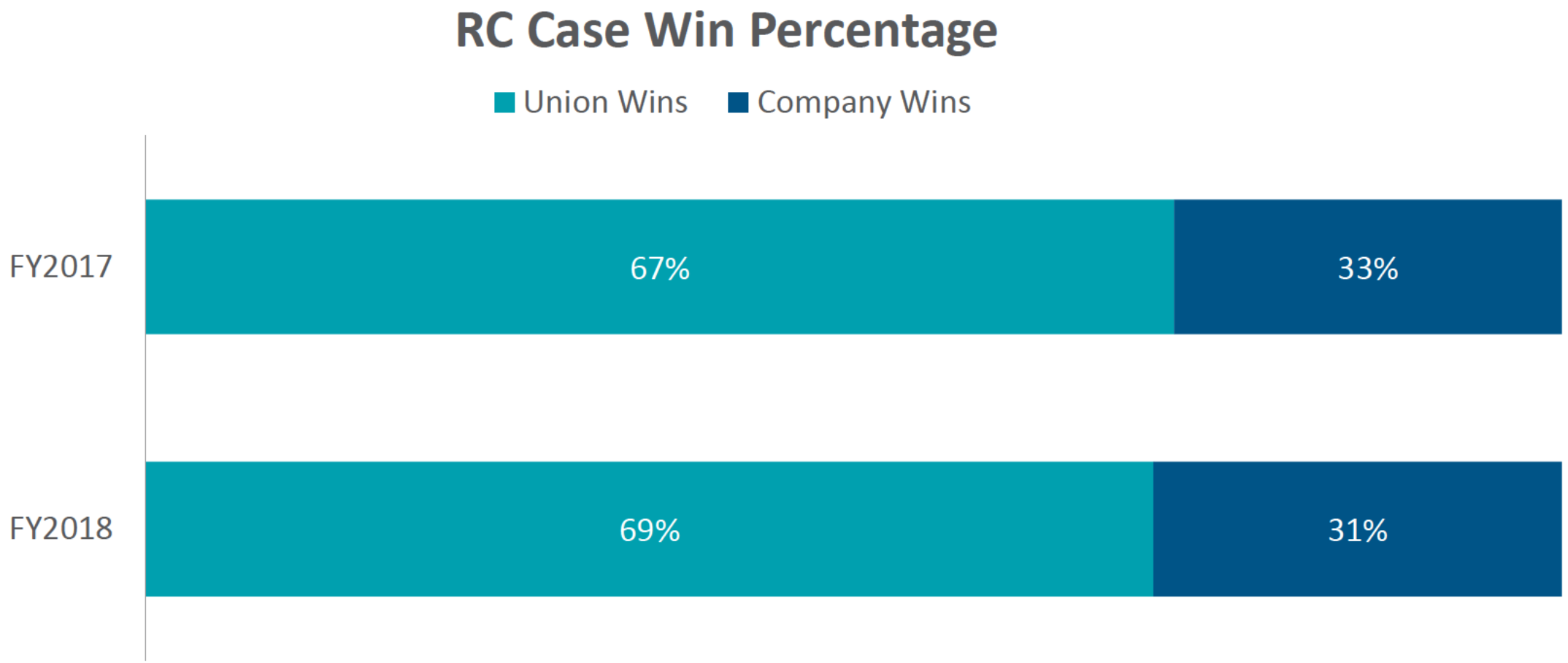
Union Representation Elections





*NLRB RC Petition Data

Election Results



Elections By Industry

Industry	2017 Elections	2018 Elections	YoY % Change
Manufacturing	136	139	2.2%
Transportation, Communication & Utilities	221	206	-6.8%
Wholesale	73	85	16.4%
Retail	70	55	-21.4%
Services	777	578	-25.6%
Health Care Services	307	201	-34.5%
Finance, Insurance, Real Estate	74	40	-45.9%
Construction	53	48	-9.4%
Mining	4	12	200%

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Reality Check

Social Media

Technology for Organizing

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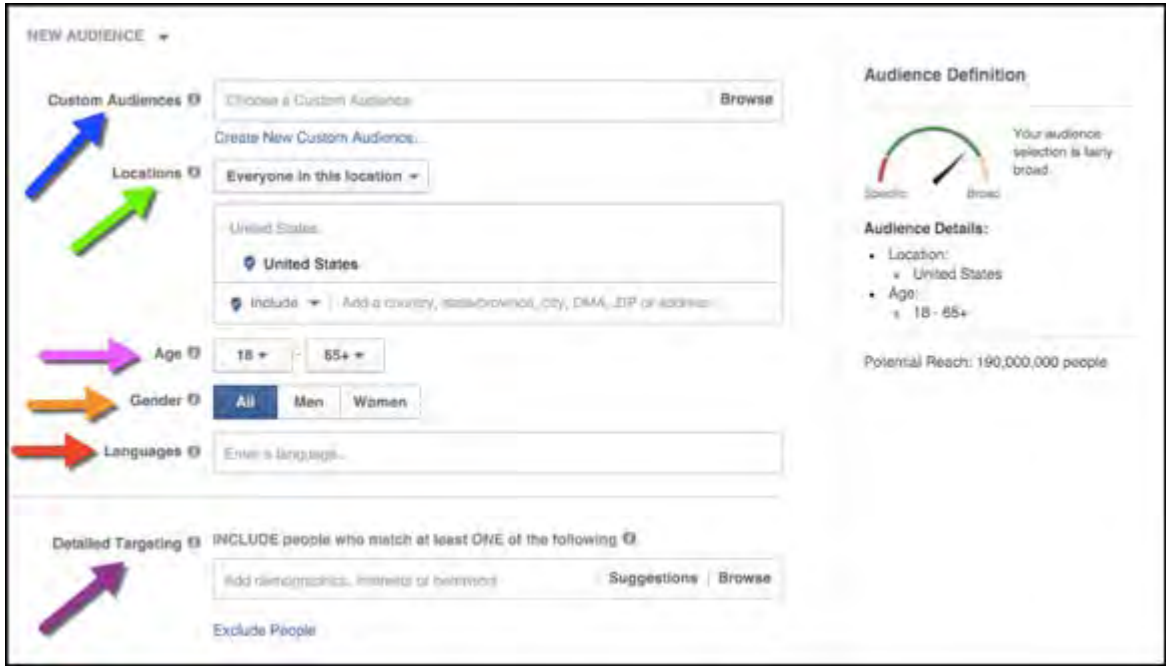
Public Forums

- Facebook
- Twitter
- LinkedIn
- Yelp
- Reddit
- Flickr

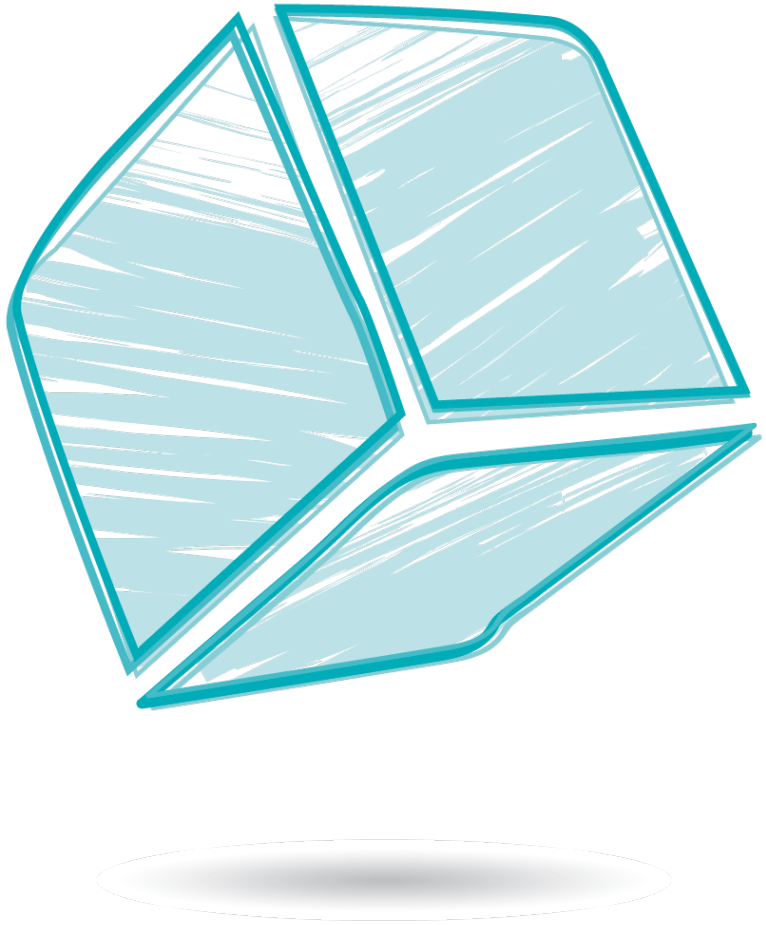
How Can Ads Be Targeted?

- Lookalike Audience
- Geography
- Demographics
- Interests
- Activity Based



Targeted Applications

- WorkIt
- Texting
- Closed Facebook groups
- Coworker.org
- Union Connect
- Whats App
- Intagram
- Union specific apps – UAW, etc.



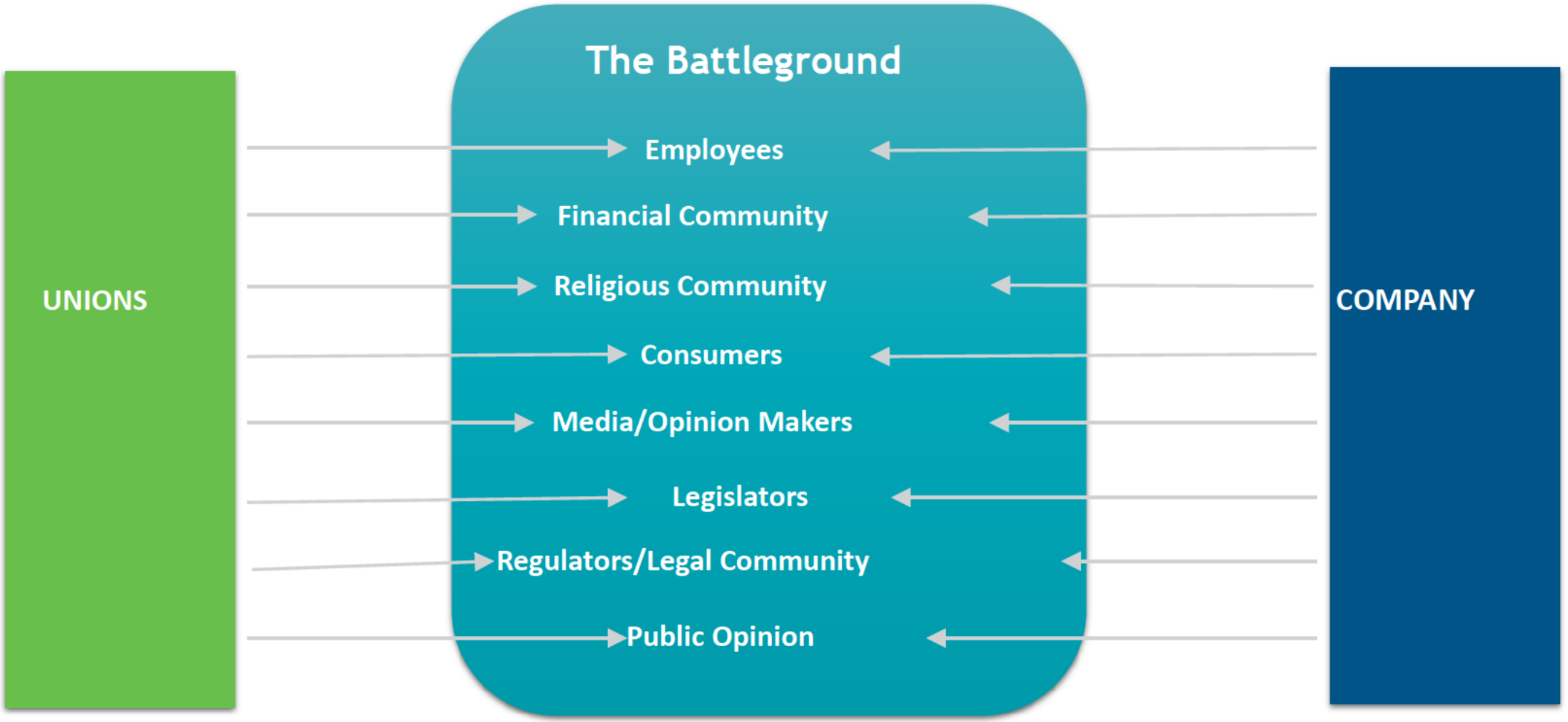
UFOs & Corporate Campaigns

“Death of a Thousand Cuts”

- *“Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow.”*

  – Richard Trumka,
  AFL-CIO president

Corporate Campaign Pressure Points



UNITE-HERE “Fair Hotels”

- On-line petition supporting workers
- Model language for event contracts
- Travel alert website designates “At risk” and “Fair hotels”

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Committee For Better Banks

Multi-faceted attack on “Big Banks”:

- Customer/community focus
- Focus on wide range of issues in financial services industry
- Aggressive, public action

COMMITTEE FOR BETTER BANKS

BRINGING CHANGE TO OUR INDUSTRY

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National Council for Occupational Safety and Health

- "COSH" Groups: coalitions of labor unions and other advocates of for worker health and safety
- "Working with unions to integrate health and safety activism into organizing campaigns"

TOOLS FOR TRAINERS AND ORGANIZERS

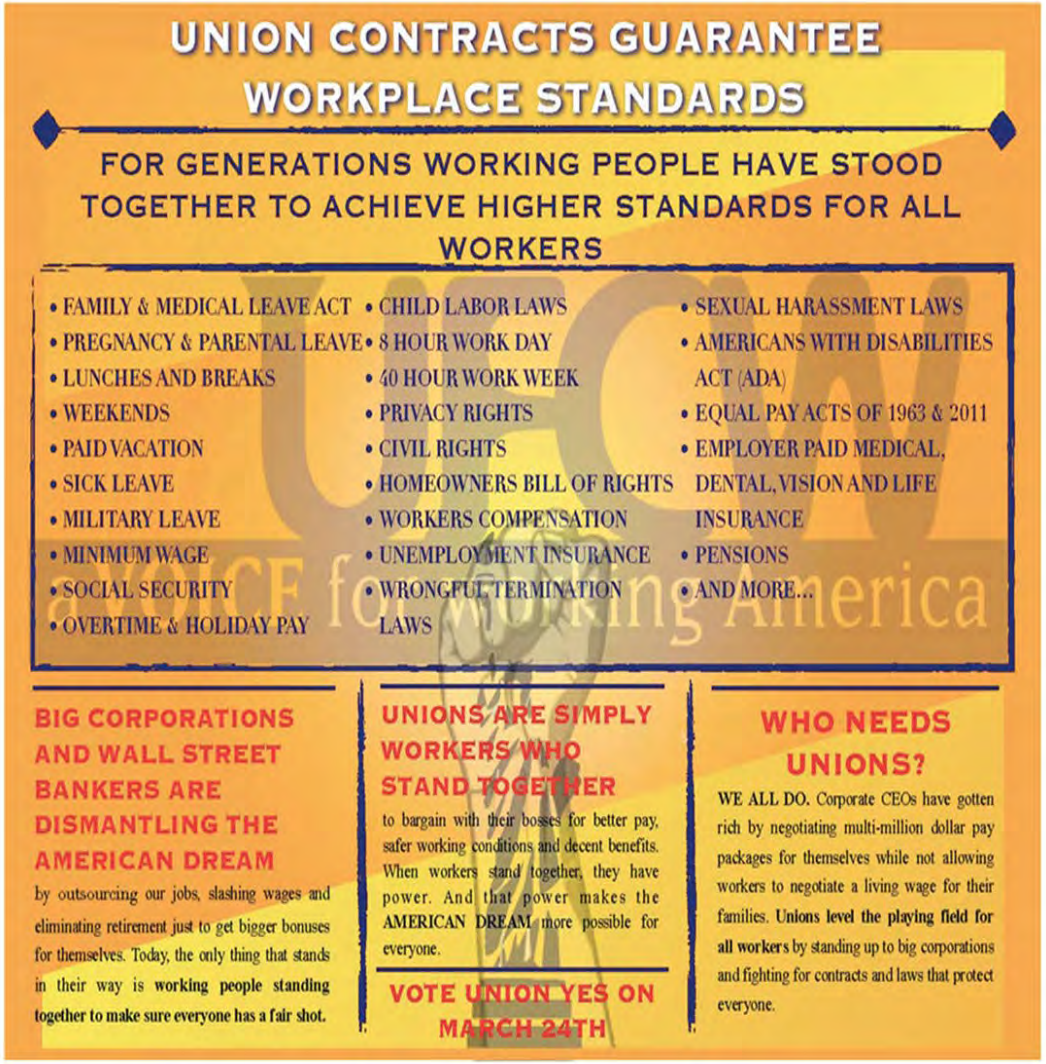
NATIONAL COUNCIL FOR OCCUPATIONAL SAFETY AND HEALTH

COSH

The Road Ahead…

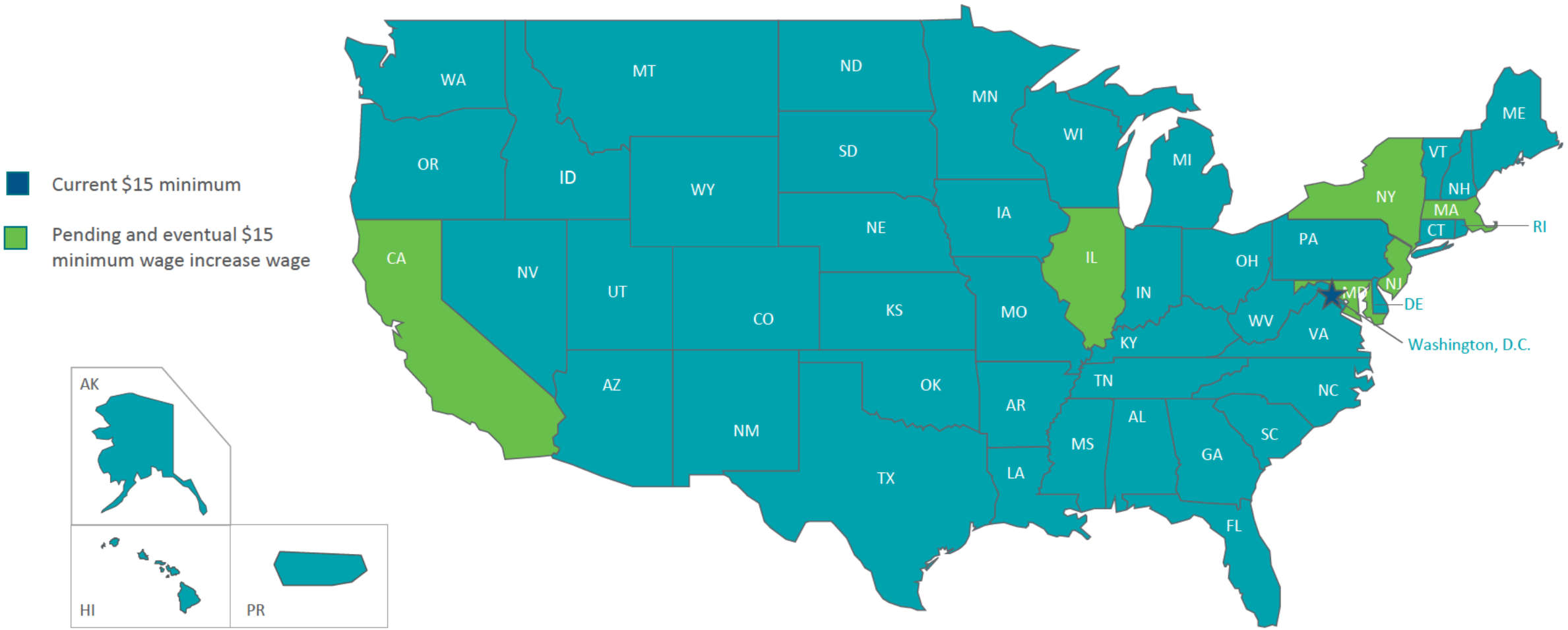
Legislative Update

TGI...Labor?


UNION CONTRACTS GUARANTEE WORKPLACE STANDARDS
FOR GENERATIONS WORKING PEOPLE HAVE STOOD TOGETHER TO ACHIEVE HIGHER STANDARDS FOR ALL WORKERS
• FAMILY & MEDICAL LEAVE ACT
• PREGNANCY & PARENTAL LEAVE
• LUNCHES AND BREAKS
• WEEKENDS
• PAID VACATION
• SICK LEAVE
• MILITARY LEAVE
• MINIMUM WAGE
• SOCIAL SECURITY
• OVERTIME & HOLIDAY PAY
• CHILD LABOR LAWS
• 8 HOUR WORK DAY
• 40 HOUR WORK WEEK
• PRIVACY RIGHTS
• CIVIL RIGHTS
• HOMEOWNERS BILL OF RIGHTS
• WORKERS COMPENSATION
• UNEMPLOYMENT INSURANCE
• WRONGFUL TERMINATION LAWS
• SEXUAL HARASSMENT LAWS
• AMERICANS WITH DISABILITIES ACT (ADA)
• EQUAL PAY ACTS OF 1963 & 2011
• EMPLOYER PAID MEDICAL, DENTAL, VISION AND LIFE INSURANCE
• PENSIONS
• AND MORE...
BIG CORPORATIONS AND WALL STREET BANKERS ARE DISMANTLING THE AMERICAN DREAM
by outsourcing our jobs, slashing wages and eliminating retirement just to get bigger bonuses for themselves. Today, the only thing that stands in their way is working people standing together to make sure everyone has a fair shot.
UNIONS ARE SIMPLY WORKERS WHO STAND TOGETHER
to bargain with their bosses for better pay, safer working conditions and decent benefits. When workers stand together, they have power. And that power makes the AMERICAN DREAM more possible for everyone.
VOTE UNION YES ON MARCH 24TH
WHO NEEDS UNIONS?
WE ALL DO. Corporate CEOs have gotten rich by negotiating multi-million dollar pay packages for themselves while not allowing workers to negotiate a living wage for their families. Unions level the playing field for all workers by standing up to big corporations and fighting for contracts and laws that protect everyone.


THE LABOR MOVEMENT!
THE FOLKS THAT BROUGHT YOU...
OVER-TIME PAY
LIVING WAGE LAWS
FOUGHT FOR:
DEFENDS
DEMANDS
PARENTAL LEAVE
DOMESTIC PARTNER BENEFITS
PAID VACATION
CHILD LABOR LAWS
SOCIAL SECURITY
SICK LEAVE
CIVIL RIGHTS
WORKPLACE POWER
PENSION BENEFITS
GRIEVANCE PROCEDURES
OSHA
HEALTH BENEFITS
WORKERS' COMP.
MINIMUM WAGE
FARM LABOR RIGHTS!
UNEMPLOY-MENT INSURANCE
THE WEEK-END
EQUAL PAY FOR EQUAL WORK
POWER CONCEDES NOTHING WITHOUT A DEMAND. IT NEVER DID AND IT NEVER WILL. • FREDERICK DOUGLASS

Fight for 15: $15 Per Hour State and Local Minimum Wage Laws



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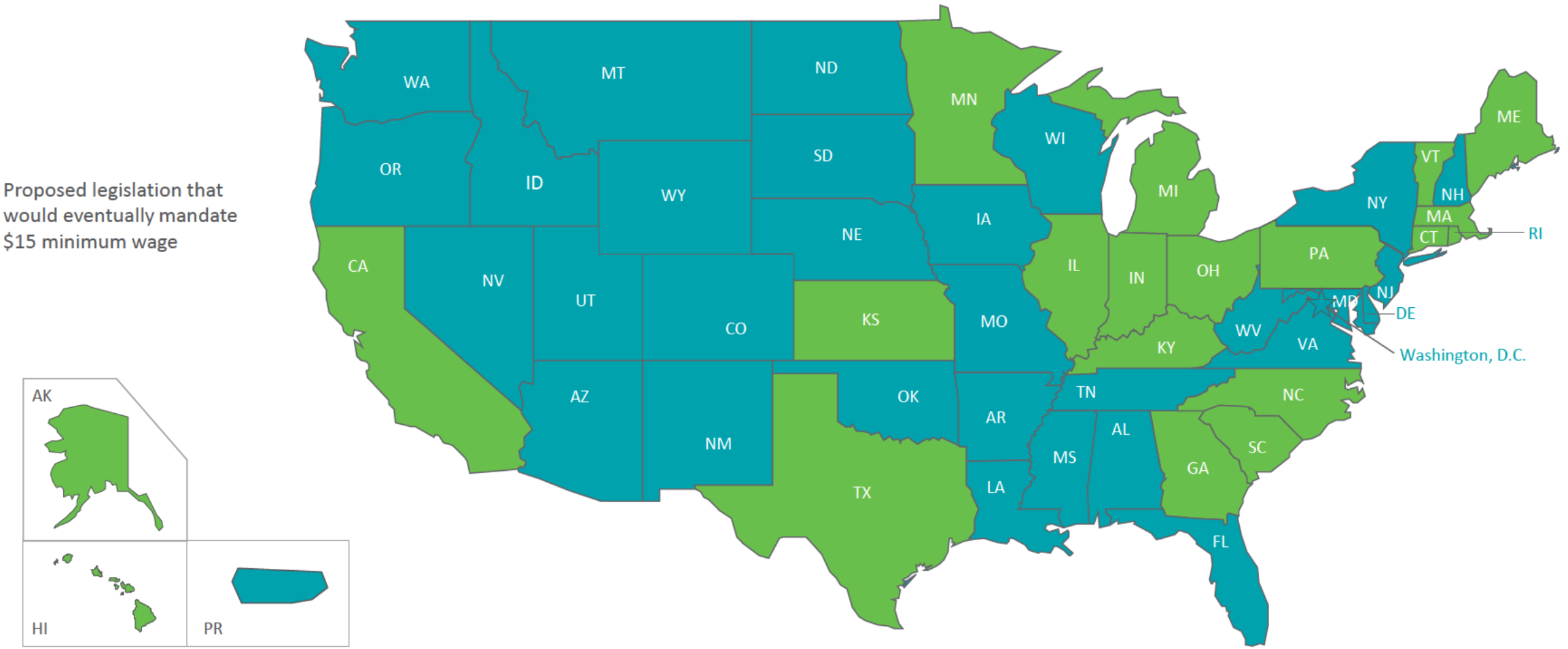
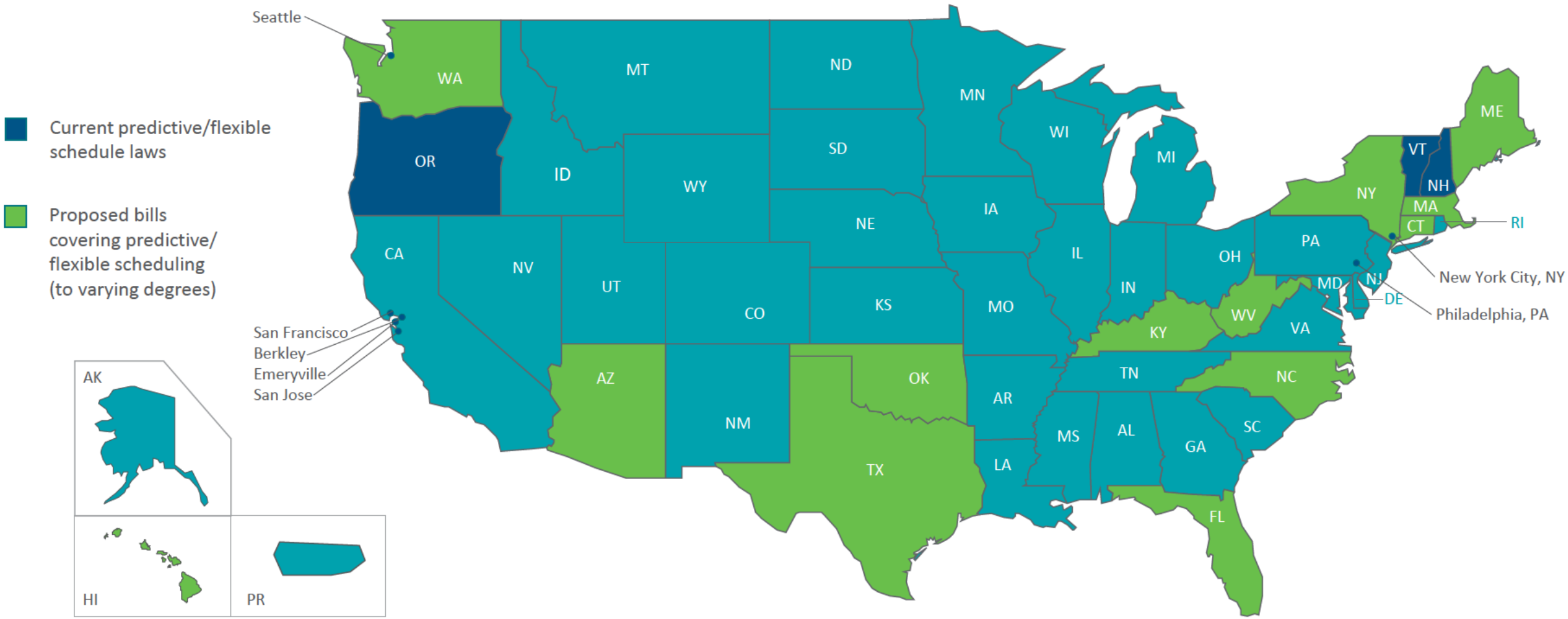
Fight for 15: Proposed Legislation

Proposed legislation that would eventually mandate $15 minimum wage



Predictive and Flexible Scheduling Laws



Evidence in Local Markets: NYC

- Fair Workweek Law
- Earned Safe & Sick Time Act
- $15/hr

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“What A Surprise!” (Said Nobody in NYC)

Executive Order No. 19 (7/14/16):

Labor Peace for Retail Establishments at City Development Projects

“What A Surprise!” (Said Nobody in NYC)

‘This is a union town’ — NYC councilman says Amazon’s HQ2 is ‘antithetical’ to our values

PUBLISHED MON, FEB 11 2019 • 1:22 PM EST | UPDATED MON, FEB 11 2019 • 2:11 PM EST

Evidence in Local Markets: NJ

- S. 3071, effective 5/1/19
- Requires contractors engaged in public works to participate in a US DOL registered apprenticeship program in order to register/re-register
- >10,500 registered contractors

“What a surprise!” (said nobody in NJ)

Labor unions hoping for a 'brighter opportunity' under Murphy

By KATHERINE LANDERGAN

When then-candidate Phil Murphy accepted yet another endorsement from organized labor in October, he condemned the current governor for often suggesting that unions are the problem — and never part of the solution.

“We’re going to change the tone in Trenton and have an administration that holds our hard-working union men and women in the greatest possible respect," Murphy, a Democrat, promised members of the Northeast Regional Council of Carpenters that day.

EFCA Redux Coming?

- Workplace Democracy Act (S.2810 (115th))
  - Card check
  - Persuader registration and reporting
  - Adds new ULP: coercing employee into attending campaign meetings
  - 120 days to bargain, else arbitration
  - Expands definition of Supervisor
  - Codifies tests for IC's and for joint employer liability
  - Bags old ULP's for secondary boycotts and recognitional picketing.
    - No more §303 actions
    - No more 10(k) or 10(l) relief
  - Repeals 8(e) – "hot cargo" permissible
  - Repeals 29 USC 164(b), permitting Right to Work States

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Questions?

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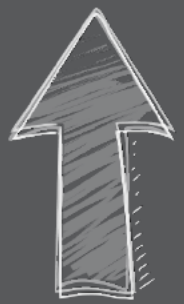

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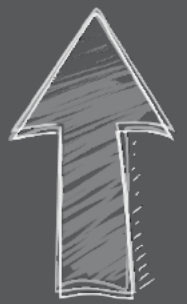

From: Martin, Andrew
Subject: Legal News FYI 05-08-19
Date: Wednesday, May 8, 2019 9:30:58 AM
Attachments: image001.png

Wednesday, May 8, 2019

Uber drivers strike, protest ahead of company's IPO
The Mercury News (San Jose, CA) 08 May 2019 09:14
Lyft drivers join worker actions reported from coast to coast — and overseas Two days before Uber is set to go public, the drivers who power its business are protes ing and striking around the nation and beyond. On the East Coast, drivers drove across...

Labor Bill Offers Policy Barometer for Democratic Hopefuls
BloombergLaw - Daily Labor Report 08 May 2019 07:06
By Patricio Chile A House Education and Labor subcommittee will take up a bill today that may serve as a labor policy barometer for Democrats seeking the White House . AFL-CIO President Richard Trumka, who's group is already being courted by White House...

United States: The NLRB Continues To Chip Away At Individual Protected Concerted Activity
Mondaq Business Briefing 08 May 2019 06:55
An employee's right to engage in concerted activities for the purpose of mutual aid and protection is basic to the National Labor Relations Act's (NLRA) Section 7. Although these concepts, "concertedness" and "mutual aid or protection", sound similar and...

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)
BloombergLaw - Daily Labor Report 07 May 2019 17:06
The Pacific Maritime Association and a terminal operator unlawfully applied a Longshore and Warehouse union's multiemployer collective-bargaining agreement to discipline a watchman who allegedly called a covered marine clerk—who allegedly called him...

Blog Post: Greyhound Wrongly Fired Driver After Fiery Talk, NLRB Says
LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 07 May 2019 14:55
The National Labor Relations Board has ruled that Greyhound ran afoul of federal labor law when it fired a union steward following a heated confrontation with a manager, rejecting the company's claim that the steward punched the boss and noting that...

Workplace Investigations and Weingarten Rights: A Cautionary Tale
Morgan Lewis : Publications 07 May 2019 00:00
Former NLRB member Harry Johnson discusses Weingarten rights—the rights of union-represented employees to have a representative present during workplace investiga ion interviews. Analyzing the NLRB's decision in PAE Applied Technologies, LLC , Harry...

Strike by Uber and Lyft drivers Wednesday has potential to disrupt travel for thousands
Washington Post, 08 May 2019

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: POLITICO"s Morning Shift
To: Ring, John
Subject: Harris takes on the gender pay gap — Trump"s Rust Belt slide — Sprint, T-Mobile merger gets mixed signals
Date: Tuesday, May 21, 2019 10:02:34 AM

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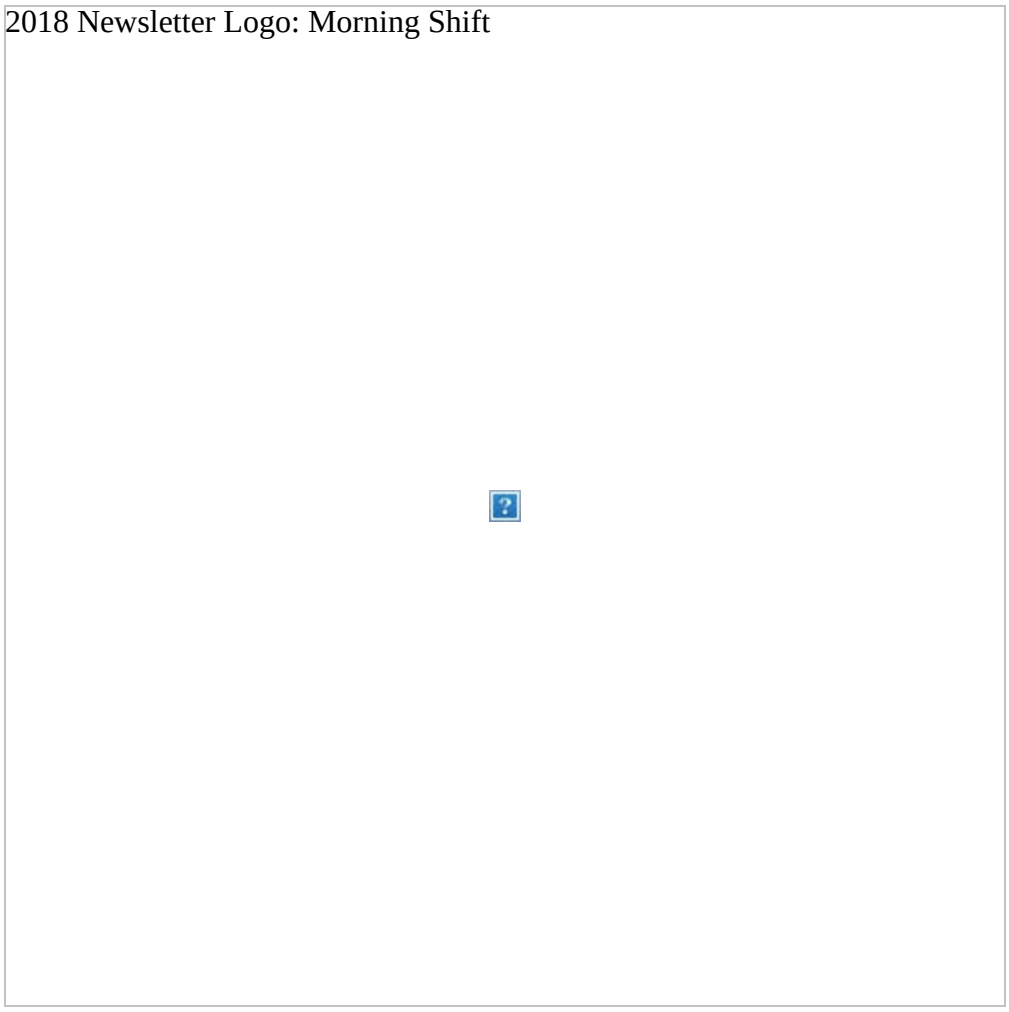

BY **REBECCA RAINEY**

Editor's Note: This edition of Morning Shift is published weekdays at 8 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 5:15 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— 2020 hopeful Sen. Kamala Harris (D-Calif.) pledged to eliminate the

gender wage gap.

— President Donald Trump's edge in union-dense Rust Belt states may be slipping.

— Trump's FCC chairman is green-lighting a merger between T-Mobile and Sprint that Democrats have warned will "destroy jobs and drive down wages."

GOOD MORNING! It's Tuesday, May 21, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

HARRIS TAKES ON THE GENDER PAY GAP: The California Democrat released what her campaign billed as "the most aggressive equal pay proposal in history" on Monday, a sweeping plan that would fine corporations that don't address their pay disparities and put the revenues toward funding universal paid family and medical leave. POLITICO's Ian Kullgren breaks down how it would work:

What it would do: "Companies would face a 1 percent profit fine for every 1 percent wage gap that they allow to exist in their ranks," and would have to receive "equal pay certification" every two years under a new federal program headed by the EEOC, according to Kullgren. The campaign expects the fines to total $180 billion in the first decade, which would fund paid family and medical leave under the FAMILY Act, S. 463 (116) , a bill widely embraced by Democrats and sponsored by one of Harris' rivals, Sen. Kirsten Gillibrand (D-N.Y.).

< strong style="font-family:Helvetica,sans-serif;font-weight:bold;">How it would work: Harris says "she'll take executive action herself" on mandating the changes for federal contractors. Harris' plan also "builds upon changes made by the Obama administration to collect detailed data from companies on race, ethnicity and gender through an expanded EEOC reporting form, called the EEO-1." A federal judge recently instructed the EEOC to collect the expanded

data by Sept. 30, but the Trump administration has signaled it won't be able to comply and has appealed the order.

More from Kullgren here, and more from POLITICO's Christopher Cadelago here.

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2020 WATCH

RUST BELT SLIDE: "Donald Trump's aides and allies are moving aggressively to shore up his support in three Rust Belt states that propelled him to the presidency," after a Trump campaign polling project found the president is trailing Joe Biden in Pennsylvania, Wisconsin, and Michigan, Alex Isenstadt reports for POLITICO. "People close to the president insist they're not panicked. ... Yet there's nagging concern after a midterm election in which Republicans across the Midwest got clobbered — and as Trump's trade war is threatening farmers and factory workers who helped put him in office," he writes.

> "I think they're dug in on Trump. Whatever happens, they're going to go down with the ship with him."
> **-- TIM O'HARA, VICE PRESIDENT OF UNITED AUTO WORKERS LOCAL 1112**

Nevertheless, Trip Gabriel writes for The New York Times that in Ohio, "Trump appears to have lost little of his blue-collar support." He points to a Brookings Institution r eport from this month that found job creation has accelerated at a higher rate in counties that voted for Trump, compared with those that went for Hillary Clinton in 2016. Tim O'Hara, vice president of United Auto Workers Local 1112, which represented workers at the now-shuttered Lordstown, Ohio, General Motors plant, told Gabriel: "I don't think those Trump people are going to flip back, even if it's Joe Biden..." He added: "I think

they're dug in on Trump. Whatever happens, they're going to go down with the ship with him."

Union membership is heavy in the Rust Belt and union voters were key to delivering Trump's victory there in 2016. Some 10 percent of the 14.7 million union members in the U.S. live in Michigan, Wisconsin and Pennsylvania alone — the Rust Belt states concerning the Trump campaign — according to BLS data. FiveThirtyEight's Nate Silver predicted this month that "the union vote could be key in both the primary and the general election," noting Clinton's comparatively weak performance among union members in the general election boosted Trump in several swing states. More from POLITICO here.

Related: "Dark clouds hang over Trump's trade war," from POLITICO's Ben White

FOR YOUR RADAR

SPRINT, T-MOBILE MERGER GETS MIXED SIGNALS: FCC Chairman Ajit Pai said Monday he would recommend approval of T-Mobile's $26 billion merger with Sprint, based on a series of commitments made by the two companies, POLITICO's Margaret Harding McGill reports. But the Justice Department, which is also reviewing the deal, is leaning against approving the deal, Bloomberg reported Monday afternoon.

Some 37 House Democrats sent a letter to federal regulators earlier this year opposing the proposed merger, arguing the deal will "destroy jobs and drive down wages." The Communication Workers of America estimates the consolidation will eliminate 30,000 jobs, and researchers at the Economic Policy Institute and the Roosevelt institute, two left-leaning think tanks, estimate it will lower wireless workers' average weekly earnings by up to 7 percent in affected labor markets.

The merger would shrink the U.S. wireless market to three major players (the others being AT&T and Verizon). However, as part of the companies' commitments, they agreed to divest a prepaid wireless service, Boost Mobile, "to address concerns about the competitive impact of the deal," McGill writes. More here.

IMMIGRATION

TRUMP STILL SEARCHING FOR IMMIGRATION CZAR: POLITICO's Anita Kumar says "the hunt is still on for Trump's immigration czar," although "interest appeared to wane after the president fired DHS Secretary Kirstjen Nielsen last month." Tom Homan, the former acting director of ICE and a Fox News regular who "had been mentioned as a possible successor before Nielsen's departure" is being considered for the slot.

"When asked if he would consider the job, Homan was non-committal, saying he wasn't sure he wanted to come back because he was 'enjoying retirement too much.'"

ANOTHER MIGRANT CHILD DIES IN CUSTODY: A 16-year-old migrant boy died in custody Monday at the U.S.-Mexico border after being detained last week, "the fifth since December to perish in the hands of U.S. authorities," POLITICO's Ian Kullgren reports. Border officials have come under scrutiny for a string of child fatalities; last week, a detained 2-year-old Guatemalan boy died after suffering a form of pneumonia. More from Kullgren here.

POLITICO LAUNCHES NEW GLOBAL PODCAST: Trade. Technology. The environment. The globe is beset by profound challenges that know no political bounds. But are our world leaders up to the task of solving them? POLITICO's newest podcast, "Global Translations" presented by Citi and launching on June 6, will go beyond the headlines, uncovering what's really at stake with the most pressing issues of our time, the political roadblocks for solving them and the ideas that might just propel us forward. Subscribe to receive the first episode at launch.

UNIONS

2020 CANDIDATES JOIN MCDONALD'S PICKET: Democratic 2020 presidential contenders Bernie Sanders, Cory Booker, Julián Castro and Jay Inslee will join striking McDonald's workers across the country Thursday as they picket for a $15 minimum wage and the right to join a union. Booker will be in Des Moines, Castro in Durham and Inslee in Chicago. Sanders will host a video

town hall with striking workers in Dallas, where McDonalds is holding its annual shareholder meeting, according to a press release from the minimum wage campaign Fight for $15. The fast-food giant said in March that it would no longer lobby against minimum wage increases, but it remains embroiled in an NLRB suit over franchisees who allegedly punished employees for participating in Fight for $15 protests.

The Associated Press' Nicholas Riccardi, who first reported the strike, notes that every Democratic candidate except Andrew Yang has backed raising the federal minimum to $15. Mary Kay Henry, president of the SEIU, which backs Fight for $15, said in a statement that any candidate who wants to be elected by working people needs "to fight alongside us, no exceptions." More from the AP here.

Related read: "McDonald's Revamps Its Harassment Policy," from Bloomberg

AMERICAN AIRLINES SUES UNIONS OVER ALLEGED SLOWDOWN:< /strong> American Airlines filed a lawsuit in federal court Monday against the Transport Workers Union and the IAM alleging its mechanics represented by those unions are conducting "an illegal work slowdown to gain leverage in contract talks," the A ssociated Press reports . "The airline says mechanics have caused about 900 cancellations or long delays since early February by taking an unusually long time to repair planes and refusing to work overtime." Read the complaint here.

DEMS SEEK MORE INFO ON VW UNION VOTE: Sens. Gary Peters (Mich.), Debbie Stabenow (Mich.) and Sherrod Brown (Ohio) are pressing Volkswagen CEO Scott Keogh for an update on the situation surrounding a unionization vote at its plant in Chattanooga, Tenn.

Earlier this month, the NLRB granted the company's request to suspend proceedings on whether to allow the union election. Plant workers filed a petition with the NLRB in April to affiliate with the United Auto Workers. Read the letter here.

SAFETY

UNIONS WARN OF SAFETY RISK IN YOUNG TRUCKER PROGRAM:

Teamsters General President Jim Hoffa is expressing "grave concern" over a potential pilot program by the Federal Motor Carrier Safety Administration to allow 18-20 year olds to drive commercial vehicles in interstate commerce. Hoffa argues that "instead of discussing the rampant turnover that part of industry faces, or the low pay and tough working conditions those drivers endure," the agency is focusing "on how they can get more drivers into these jobs." While the American Trucking Associations estimates companies will be short more than 70,000 truck drivers this year, a recent report from BLS concluded, essentially, that the market for truck drivers works as well as other blue-collar job markets, and it did "not find evidence of a secular shortage."

The pilot would be the second after an earlier program that allowed drivers under 21 who had military training to drive trucks commercially. "That safeguard was an important step towards counter-acting the enormous safety risks inherent with having teenagers running tractor trailers across long distances," Hoffa said in a statement. The agency is seeking comment on the "training, qualifications, driving limitations, and vehicle safety systems" that it should consider.

WHAT WE'RE READING

— "Secret Service Officers Are Being Sent to the Border," from The Daily Beast

— "CEO Hackett: Ford Motor to lay off 500 US salaried workers this week, more by June," from The Detroit Free Press

— "'Playing Catch-Up in the Game of Life.' Millennials Approach Middle Age in Crisis," from The Wall Street Journal

— "California Teachers Pay For Their Own Substitutes During Extended Sick Leave," from NPR

— "Winnipeg Bus Drivers Go on One-Day Fare Strike," from Labor Notes

— "Somali asylum-seeker detained for over 2 years released," from The Associated Press

— "The GOP Failed to Ban Paid Sick Leave and the Business Lobby is Livid,"

from The Texas Observer

THAT'S ALL FOR MORNING SHIFT!

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Access to Justice

culbertson.jpeg

How A Fee Win For Lawyers May Help Disabled Workers

Attorneys can make a huge difference for people seeking Social Security disability benefits, but practitioners say it can be difficult to make a living handling those cases. A recent U.S. Supreme Court decision could attract more attorneys to the field.
Read full article

Access By The Numbers

5.1B People Lack Access to Justice, Landmark Report Finds

For the first time, a collection of world leaders and justice advocates have quantified the challenge facing the United Nations' stated goal of ensuring equal access to justice for all by the year 2030. Their findings paint a grim picture of a justice gap that spans two-thirds of the world population.
Read full article

Death Row Case Stirs Fears Over Quality Of Defense Counsel

Monday, May 6, 2019

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Of all the many cases an attorney might handle, death penalty cases might be the most high-stakes, which is why most people expect that the attorneys who take such cases are the best of the best.
Read full article

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4 Times Public Defenders Landed In Ethical Hot Water

Public defenders are a key cog in the U.S. criminal justice system, but as with any subset of attorneys, there are outliers who flout ethics rules. Here, Law360 looks at four times when public defenders found themselves in ethical hot water.
Read full article

Analysis

Aggressive ICE Tactics Set Up Heavyweight Clash In Mass.

The Trump administration's zealous approach to immigration enforcement at courthouses has resulted in a showdown between the federal government and progressive state prosecutors in Massachusetts, reaching a boiling point in recent days with the indictment of a sitting judge and a first-of-its-kind lawsuit by two district attorneys.
Read full article

NYPD Blocked From Using Sealed Info In New Probes

The New York City Police Department can't use information found within sealed arrest records when they investigate other matters, as the practice is barred by state law, a New York judge has ruled in a putative class action challenging the practice.
Read full article

Akerman Taps NY Pro Bono Vet To Head Volunteer Efforts

Akerman LLP has added a specialist in marshaling attorneys for volunteer efforts as the new head of its own pro bono projects, the firm has announced.
Read full article

Perspectives

Utah's Online Dispute Platform Is Streamlining Small Claims

By making small claims litigation cheaper, faster and more convenient, especially for those facing difficulty appearing in court due to work schedules or geographic distances, an online pilot program in Utah is resolving cases that would otherwise go unfiled — or defaulted upon, says Martin Pritikin, dean of Concord Law School at Purdue University Global.
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May 16, 2019

How are public-sector unions faring 1 year after *Janus*?

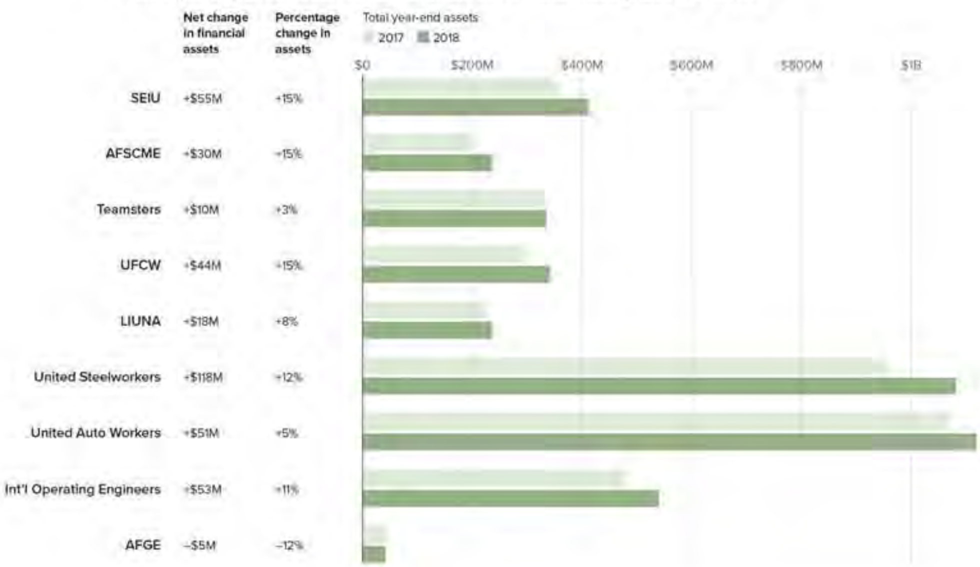
BY REBECCA RAINEY AND TUCKER DOHERTY, POLITICO PRO DATAPOINT

In June 2018, the Supreme Court ruled in *Janus v. AFSCME* that public-sector unions cannot require non-members to pay "fair share fees" — payments to compensate the union for negotiating contracts on their behalf. Effectively imposing right-to-work rules on public-sector workplaces nationwide, the ruling was expected to shrink union membership and drain union treasuries.

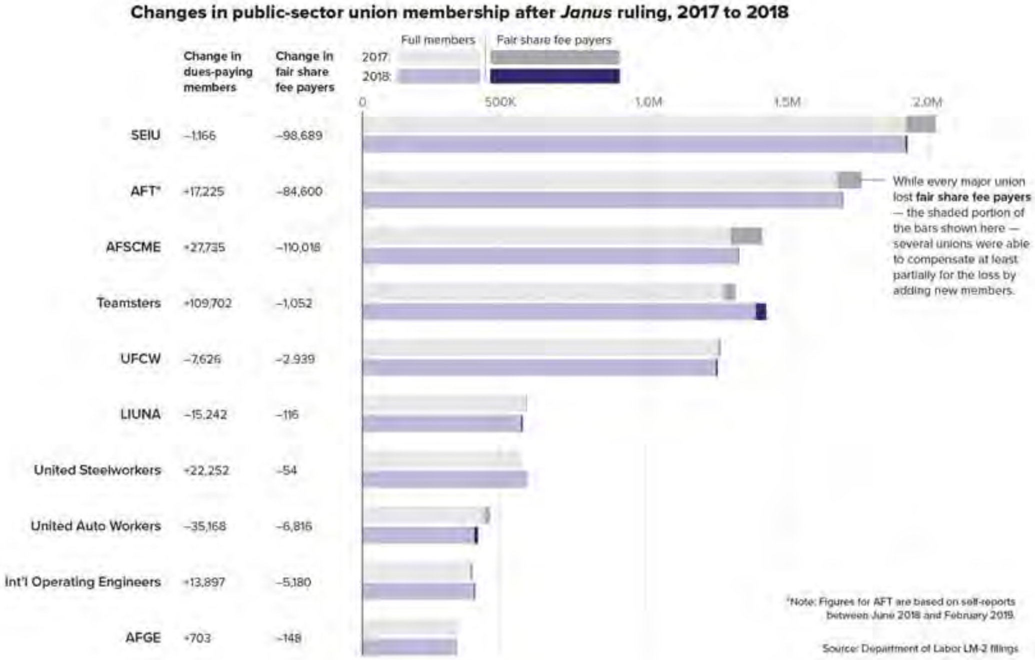
But a POLITICO review of financial filings by the major public-sector unions finds that many found ways to boost their membership to compensate for the loss of fair share fee payers, and most reported financial asset gains compared to last year.

"Unions were really prepared because sadly the outcome was really predictable," said Sharon Block, a former Obama DOL official.

Changes in public-sector union finances after *Janus* ruling, 2017 to 2018



Changes in public-sector union membership after *Janus* ruling, 2017 to 2018



*Note: Figures for AFT are based on self-reports between June 2018 and February 2019.

Source: Department of Labor LM-2 filings

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Chief Librar an
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CLE Rebroadcast May 6, 2019

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- FLSA Exemptions from Overtime – Ensuring that employees are classified correctly as exempt or non-exempt
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- Professional exemption
- Administrative exemption
- Computer, outside sales, retail sales, highly compensated test
- State Specific Rules
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Barbara DeMatteo

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Barbara DeMatteo is an accomplished professional whose Human Resources experience spans over 35 years. In supporting businesses in varied industries across the United States, Barbara continually develops her knowledge of federal and state employment regulations, strengths in employee relations, interviewing, training as well as coaching supervisors and managers. Barbara acts in the capacity of a company's outsourced HR function in providing guidance on the most effective way to handle employee situations and limit liability. Writing and revising employee handbooks, developing meaningful and targeted job descriptions, developing and implementing performance management programs, and nurturing HR professionals through on site mentoring are her strengths.

Read more here: PMPHR.com

Brian J. Shenker

Silverman Acampora LLP

Brian J. Shenker, Esq. is a labor and employment attorney who represents employers in all labor and employment matters. His experience encompasses a wide range of matters in the employer employee relationship, including wage and hour compliance, discrimination, retaliation, wrongful termination, breach of employment agreements, restrictive covenants, family and medical leave, independent contractor classifications, labor relations, employment policies, health and safety, non-competition and confidentiality agreements. Brian has also represented management in a variety of labor relations matters, including unfair labor practices and union organizing efforts.

Read more here: SilvermanAcampora.com

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GovExec Update

May 2, 2019

Trump's Pick to Lead OPM Has an Unusual Management Record for the Job // Erich Wagner

*Dale Cabaniss is appearing in front of the Senate Homeland Security and Governmental Affairs Committee for her confirmation hearing this week. In case you missed it, **we spoke to her former employees at FLRA and examined her path to the nomination for the top OPM job.:***

The March announcement that President Trump would nominate former Federal Labor Relations Authority Chairwoman Dale Cabaniss to be director of the Office of Personnel Management prompted a mixed response from stakeholder groups. Organizations representing federal managers and the Partnership for Public Service expressed support for the choice, while labor unions mostly focused on what her nomination might mean for the administration's plan to dismantle OPM and transfer its functions to other federal agencies.

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Subject: JPMorgan To Pay $5M To End Dad"s Leave-Bias Suit
Date: Friday, May 31, 2019 3:43:26 AM

EMPLOYMENT

Friday, May 31, 2019

TOP NEWS

JPMorgan To Pay $5M To End Dad's Leave-Bias Suit

JPMorgan has agreed to pay $5 million to end a class action alleging it discriminated against fathers by giving mothers more parental leave, according to documents filed Thursday in Ohio federal court laying out what an attorney for the worker who filed the case says is a first-of-its-kind deal.

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#MeToo's Reach Falling Short Of BigLaw Rainmakers

BigLaw is continuing to evade the problem of rainmakers committing sexual harassment or undercutting women and minority lawyers, a panel of experts said Thursday.

Read full article »

Cancer Center Dodges Ex-Workers' Anti-Abortion Bias Suit

A cancer treatment provider won't have to face trial over claims that it fired two employees because they opposed abortion, a Florida federal judge ruled Thursday, finding that the ousted workers were fired for legitimate reasons after a video they took of a woman being stretchered out of a neighboring abortion clinic found its way online.

Read full article »

Hyatt, Time Warner Strike Deals To End EEOC Disability Suits

The U.S. Equal Employment Opportunity Commission on Thursday said Hyatt and Time Warner Cable have each agreed to pay about $100,000 to end disability discrimination suits, quelling claims that a hotel worker was unlawfully denied a chair and that Time Warner wrongfully fired a cancer-stricken employee.

Read full article »

NY Health Network Mostly Skirts White Ex-Worker's Bias Suit

A New York federal judge ruled Thursday that a former Northwell Health Inc. employee can't pursue claims that she was fired because she is white, because the evidence she presented fell far short of proving that her termination was rooted in race bias.

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Calif. Bill Reclassifying Contractors Advances After Dynamex

California's state Assembly has passed so-called "gig work" legislation that would classify hundreds of thousands of independent contractors — including Lyft and Uber drivers, filmmakers, truck drivers and others — as employees, codifying the California Supreme Court's unprecedented Dynamex decision last year.

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DISCRIMINATION

FBI Hit With Sex Bias Suit By Rejected Agent Trainees

More than a dozen women who sought FBI agent positions accused the

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New Cases

Discrimination (72)
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bureau of allowing rampant bias in its training program in a proposed class action filed in Washington, D.C., federal court, saying it let men off the hook for the same mistakes it cited to reject most of them.
Read full article »

Starbucks Fired Worker For Bad Job, Not Bad Back, Jury Told

A Starbucks supervisor on Thursday countered allegations that the coffee giant fired a district manager because of her physical disability, telling a California federal jury she failed to regularly visit a struggling store and couldn't satisfactorily explain where she had been during the workday.
Read full article »

NJ Co. Can't Escape Deal Reached By Atty Who 'Went Rogue'

A New Jersey state appeals court on Thursday shot down an attempt by an electronics repair business to escape a $175,000 settlement in an employment discrimination action on the grounds that a former company attorney “went rogue” and struck that deal without any authority to do so.
Read full article »

WAGE & HOUR

New Ind. Law Revives Wage Deduction Claim, 7th Circ. Says

A recently enacted Indiana law allowing employers to deduct pay from workers' checks to cover uniform rentals means a federal judge must revisit her ruling that workers at auto parts manufacturer Metal Technologies were shortchanged by such deductions, the Seventh Circuit has ruled.
Read full article »

Calif. Driver Scores Class Cert. In Trucking Co. Wage Spat

A California federal judge on Wednesday partially certified a wage-and-hour class action alleging trucking company John Christner Trucking LLC misclassified drivers as independent contractors, saying common questions on the company’s piece-rate pay plan can be ironed out on a classwide basis.
Read full article »

Uber Mum On Whether Calif. Agency Can Raise Its Rates

Uber told a California federal judge on Thursday it's exempt from a state anti-competition law as a so-called transportation network company regulated by the California Public Utilities Commission, but couldn't offer a definitive answer when the judge asked whether the agency has the power to raise Uber's rates.
Read full article »

Six Flags Employees Deserve Overtime, Mass. Class Argues

A Six Flags amusement park in Massachusetts failed to properly calculate the number of days the park operates annually so it could deny employees overtime pay under state law, a certified class of more than 18,000 employees told a judge Thursday in Boston's Business Litigation Session.
Read full article »

Hotelier Says Housekeepers' Class Lead Never Worked OT

A hotel operator accused of shorting housekeepers on their overtime in a proposed class action asked a Pennsylvania federal judge to throw the case out Thursday, arguing its own payroll records contradicted the proposed lead plaintiff’s claims that she’d put in extra hours.
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LABOR

Railroads Defend DOT's Inspection Rule Pause At DC Circ.

Railroads urged the D.C. Circuit on Wednesday to dump a labor union's challenge to the federal government's limited suspension of track safety

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Deutsche Bank AG
Dynamex, Inc.
Google Inc.
Home Depot Inc.
JPMorgan Chase & Co.
John Christner Trucking LLC

regulations so that BNSF Railway Co. can test a new automated track inspection system.

Read full article »

WORKER PRIVACY

Citrix Sued By Ex-Employees Over Hack Of Personal Info

Two former employees of software company Citrix Systems Inc. filed a proposed class action Thursday in Florida federal court claiming the company failed to protect their personal information from hackers who breached the company's servers last year and stole their information.

Read full article »

WORKER SAFETY

Subcontractor Can't Duck $8.7M Home Depot Damages Award

The Second Circuit on Thursday upheld a decision that a subcontractor must cover nearly $8.7 million in damages awards against Home Depot over a worker's electrocution at a New York construction site.

Read full article »

WRONGFUL TERMINATION

Doc Gets 2nd Shot At Suit Saying Ill. Atty Botched His Appeal

A doctor's malpractice suit against a Chicago attorney who represented him in a wrongful termination case isn't time-barred because the lawyer's failure to file an appellate brief in the employment case paused the two-year statute of limitations period, an Illinois appellate court held Tuesday.

Read full article »

EXPERT ANALYSIS

5 Mitigation Strategies To Address Employee Pay Gaps

The recent reintroduction of the U.S. Equal Employment Opportunity Commission's EEO-1 reporting process provides an added incentive for many employers to examine their pay structures. But if a pay gap is identified, employers may struggle with how to best respond, says Quenton Wright of Charles River Associates.

Read full article »

Employer Visa Challenges Inspire Forward-Thinking Bill

A recent uptick in nonimmigrant visa denials has caused uncertainty for many U.S. employers, but the proposed Immigration Innovation Act could help reform existing law and slash many of the restrictive policies that have ensued in recent years, say Sanjee Weliwitigoda and Xavier Francis of Berry Appleman.

Read full article »

LEGAL INDUSTRY

The 2019 Law360 Glass Ceiling Report

Our annual survey of the largest U.S. law firms again shines a light on the lack of parity for female attorneys in private practice.

Read full article »

Trump Taps Dorsey & Whitney Atty For Utah Judgeship

President Donald Trump has announced three new judicial nominations to district courts in Utah, New Mexico and the U.S. Virgin Islands, including a former U.S. attorney for the District of Utah currently with Dorsey & Whitney LLP.

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Lyft Inc.
NFL Enterprises LLC
Northwell Health Inc.
Spectrum Management Holding Co.
Starbucks Corp.
Uber Technologies Inc.
United Continental Holdings Inc.
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Bureau of Citizenship and Immigration Services
California Public Utilities Commission
California Supreme Court
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U.S. Army
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U.S. Department of Homeland Security
U.S. Department of Justice
U.S. Department of Labor
U.S. Department of Transportation
U.S. House of Representatives
U.S. Immigration and Customs Enforcement
U.S. Supreme Court
United States District Court for the Eastern District of Pennsylvania

DLA Piper Name Used As Bait In Fake Lawyer Phishing Scam

Email scammers have been masquerading as attorneys from the U.K. arm of DLA Piper, the Solicitors Regulation Authority warned on Wednesday, the latest in a string of email scams that co-opt the names of authentic British firms and personnel.

Read full article »

No-Show Deutsche Bank Whistleblower Loses Dismissal Bid

A Deutsche Bank whistleblower, facing a lawsuit by Canadian consultants seeking a cut of his $8.25 million U.S. Securities and Exchange Commission award, got bad news on his dismissal bid from a New York state court judge Thursday — but no one on his team was there to hear it.

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IP Atty's Ex-Wife Looks To Win His 401(k) Funds

The ex-wife of a former Eaton & Van Winkle LLP intellectual property attorney has urged a New York federal judge to award her the funds in a 401(k) plan he had with the firm, the latest move in a fight over whether she or the lawyer's current wife should get the money.

Read full article »

Mass. Judge Charged With Aiding ICE Escape Asks For Salary

A Massachusetts state judge charged with helping an immigrant escape U.S. Immigration and Customs Enforcement custody may soon need to choose between keeping her home and mounting a strong defense, her lawyers told the state's top court Thursday in a bid to reinstate her salary.

Read full article »

Law360's Weekly Verdict: Legal Lions & Lambs

A team of Varnell & Warwick PA and nonprofit attorneys made this week's legal lions list with a high court win on class action removal practices, while Montgomery McCracken Walker & Rhoads LLP was among the legal lambs after a jury slammed its client with up to $68 million in damages.

Read full article »

Podcast

Law360's Pro Say: Will The Glass Ceiling Ever Break?

For years women have been looking around their law firms and seeing mostly men in leadership. When will things change? On the latest episode of Law360's Pro Say podcast we discuss our annual Glass Ceiling report, which reveals a glacial pace for increased gender parity in the law, and we talk to one prominent female attorney who managed to crack the glass ceiling.

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mid level L&E assoc/40 yr old 50 atty NYC firm
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South San Francisco, California

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Duane Morris LLP
San Diego, California

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Washington, District of Columbia

Enforcement Attorney
U.S. Securities & Exchange Commission
Philadelphia, Pennsylvania

Experienced Employment Associate

Assistant Counsel II, Talent - The Estée

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Portland, Oregon

Lauder Companies
The Estee Lauder Companies
New York, New York

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Wilmington, Delaware

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From: Access to Justice Law360
To: Ring, John
Subject: How Litigation Funding Can Save, And Doom, Poor Plaintiffs
Date: Monday, May 13, 2019 7:34:07 AM

large

How Litigation Funding Can Save, And Doom, Poor Plaintiffs

Companies that give cash advances on lawsuit settlements can help plaintiffs in need, but few are watching this growing industry, leaving a vulnerable population at the mercy of largely unregulated lenders.
Read full article

Man Beats Murder Charge, And Odds, By Helming Own Case

Eight years into what ultimately became a nearly 13-year prison stint, Hassan Bennett made the rare and often criticized choice to take over as his own counsel as he fought charges for a murder he insisted he didn't commit. This month, however, he finally became a free man.
Read full article

Can Online 'Pajama Courts' Reshape Justice?

At any given hour of the day, someone in Utah could be wearing pajamas, sitting in bed, sipping a coffee — and handling a legal dispute over a $500 debt.

Monday, May 13, 2019

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Barasch McGarry
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Bernstein Shur
Berry Appleman
Best Best & Krieger
Beveridge & Diamond
Bingham Greenebaum
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Boies Schiller
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Legal Aid Groups Think Bold To Fill Rural Gaps

Living in a vast state where wide swaths of land are unreachable by road, many Alaskans lack regular access to police, courts and the legal services that concentrate in urban areas. To combat the problem, the Alaska Legal Services Corp. had to accept one fundamental fact.
Read full article

Female Defenders Decry Handling Of 'Heinous' Sex Conduct

A lawsuit against Cook County, Illinois is forcing a discussion on how to protect female public defenders from sexual harassment when they visit clients in courthouse detention facilities and jails.
Read full article

Haggis Case Tests Boundaries Of NYC Gender Violence Law

An appellate case in New York involving rape allegations against movie director Paul Haggis is serving as a showcase for a New York City law against gender-motivated violence, which supporters of the accuser say covers a wider spectrum of crimes than Haggis wants the court to believe.
Read full article

Mass. Justices Won't Force Probes For Juror Language Bias

Judges aren't required to probe potential jurors for bias against non-English speakers in criminal cases where a defendant uses an interpreter, the Massachusetts Supreme Court has ruled, though it urged judges to do so when asked.
Read full article

Getting Random With Harvard A2J Lab's Greiner

Jim Greiner, director of Harvard University's Access to Justice Lab, wants to bring randomized controlled trials to the practice of law. He says the results could change the delivery of legal services and help those unable to afford lawyers.
Read full article

Perspectives

Calif. Lawmakers Should Stay Out Of USC Sex Abuse Case

A pending settlement between the University of Southern California and 17,000 former students would resolve claims over the actions of a sexually abusive gynecologist. But proposed state legislation could undermine the settlement, says Shook Hardy partner Phil Goldberg, director of the Progressive Policy Institute's Center for Civil Justice.
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From: Employment Law360
To: Ring, John
Subject: Law360 Reveals 400 Largest US Firms
Date: Monday, May 13, 2019 4:18:21 AM

EMPLOYMENT

Monday, May 13, 2019

LAW360 400

Law360 Reveals 400 Largest US Firms

The annual Law360 400 ranks the largest U.S.-based law firms and vereins with a U.S. component by domestic attorney headcount.

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Megafirms Drive Thirst For Tie-Ups As Firms Scale Up

The biggest of BigLaw raised the bar for size and pace in yet another record-breaking year for mergers, as more firms tried to compete by swelling their ranks, according to Law360's annual law firm ranking.

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These Law Firms Keep Their Partnership Ranks Lean

Want to be a partner at these firms? Better have rainmaker potential. Here is the list of firms with the most elite partnerships, according to Law360's annual law firm ranking.

Read full article »

TOP NEWS

7 House Labor And Employment Bills To Watch

Democrats have wasted no time pushing an aggressively pro-worker agenda since retaking the U.S. House of Representatives, proposing and spotlighting plans to strengthen unions, spike mandatory arbitration, outlaw discrimination against gay and transgender workers, and more. Here, Law360 looks at a few key proposals and where they stand.

Read full article »

2 Women Move To Spearhead Ogletree Pay Bias Case

Two former Ogletree shareholders who joined a class action last year accusing the firm of underpaying women are angling to take the case's helm after the original named plaintiff's claims were kicked to arbitration.

Read full article »

Teamsters Want NLRB Member Off Joint-Employer Case

National Labor Relations Board member William Emanuel shouldn't participate in a case on remand from the D.C. Circuit over the NLRB's joint-employer test because his former law firm Littler Mendelson PC represents one of the parties, the Teamsters have told the agency.

Read full article »

Ex-Exec's Novel Hacking Suit Against Hedge Fund Gets Axed

A New York federal court has tossed a suit alleging a hedge fund executive's former firm hacked into his home computer to dredge up information it then used to cut him out of millions in severance, finding the suit duplicative in light of a pending state court case.

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Fresenius Beats Fired Worker's Age Discrimination Suit

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ERISA (35)
Labor (54)

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Armstrong Teasdale
Arnall Golden
Arnold & Porter
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Atkinson Andelson
Babst Calland
Baker Botts
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Baker McKenzie
BakerHostetler
Balch & Bingham
Ballard Spahr
Banner & Witcoff
Barack Ferrazzano
Barasch McGarry
Barclay Damon
Barnes & Thornburg

An Illinois federal judge on Friday let Fresenius Kabi escape a former worker's suit claiming he was fired because of his age and for complaining that the pharmaceutical and medical device company unfairly applied its break policy in favor of younger employees.
Read full article »

DISCRIMINATION

Calif. Judge Program Biased Against Older Jurists, Suit Says

Three retired California state court judges have accused the state's Judicial Council and the chief justice of its high court of age discrimination, claiming in a suit filed Thursday that new rules limiting the time retired judges participating in a state assignment program can spend working are unfair.
Read full article »

Doc's Retaliation Claims Nixed After Arbitration, 3rd Circ. Says

St. Luke's University Health Network knocked down a doctor's bid to revive claims she was fired for objecting to discriminatory remarks by management, with the Third Circuit ruling Friday that a Pennsylvania federal court properly sent the dispute into an arbitration proceeding where the hospital system ultimately prevailed.
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TRADE SECRETS

DOJ Says Old Probe DQs Sidley Atty, Its Ex-No. 2, In Huawei

A Sidley Austin LLP partner defending Huawei in a case claiming that it was deceptive about its dealings in Iran is conflicted because the case is "substantially related" to an unidentified investigation he worked on in his former post as U.S. deputy attorney general, prosecutors said in a heavily redacted motion unsealed Friday.
Read full article »

NONCOMPETES

Ex-Panera IT Execs Blocked From Working For Competitors

A Delaware Chancery judge granted an injunction Friday that bars three former information technology executives of Panera Bread Co. from working for a group of competitors tied to Panera's onetime CEO.
Read full article »

WORKER PRIVACY

Senior Home, Kronos To Pay $1.6M In Biometric Privacy Deal

A Chicago senior living center and its time clock supplier will pay $1.55 million to settle claims that the two scanned and collected employees' fingerprints in violation of the Illinois biometric information privacy law.
Read full article »

EXECUTIVE COMPENSATION

Ex-Abiomed Exec Asks 1st Circ. To Revive $5M Bonus Suit

A fired executive asked the First Circuit on Friday to revive his suit against Abiomed Inc., saying the medical implant maker wrongly canned him just before he would have received shares now worth up to $5 million.
Read full article »

WHISTLEBLOWER

Rice Energy Says Ex-Worker Killed Own Whistleblower Claims

The former Rice Energy Inc. on Thursday said an ex-employee gave up his whistleblower claims when he admitted he didn't think the company broke the

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Bass Berry
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Beveridge & Diamond
Bingham Greenebaum
Blank Rome
Boies Schiller
Bond Schoeneck
Bose McKinney
Bowles Rice
Bowman and Brooke
Bracewell
Bradley Arant
Bressler Amery
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Briggs and Morgan
Brinks Gilson & Lione
Brown & James
Brown Rudnick
Brownstein Hyatt
Bryan Cave
Buchanan Ingersoll
Buckley LLP
Burke Williams
Burns & Levinson
Burns White
Burr & Forman
Butler Snow LLP
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Butzel Long
Cahill Gordon
Calfee Halter
Carlton Fields
Carr Allison
Chamberlain Hrdlicka
Chapman and Cutler
Chiesa Shahinian
Cipriani & Werner
Cipriani and Werner
Clark Hill
Cleary Gottlieb
Cohen & Grigsby
Cole Schotz
Cole Scott
Connell Foley
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law, and asked a Pittsburgh federal court to nix his bid to dig up more information on an ex-employee accused of stealing trade secrets and an allegedly conflicted contractor in an effort to bolster those claims.
Read full article »

W.Va. Hospital Wants DOJ Kickbacks Suit Sent Home

Wheeling Hospital Inc. asked a Pittsburgh federal judge Friday to transfer a U.S. Department of Justice case accusing the hospital of taking kickbacks to the federal court in West Virginia, arguing that the court there would be more convenient for nearly every witness and piece of evidence.
Read full article »

WORKER SAFETY

$1M Medical Expenses Award Reinstated In La. Asbestos Case

A Louisiana appeals court has reinstated a $1 million jury award for medical expenses as part of a nearly $3 million verdict in a suit accusing two shipping companies of causing an employee's cancer due to asbestos exposure, saying the award was supported by evidence.
Read full article »

BANKRUPTCY

US Trustee Says Southcross Can't Seal Creditor Info

The federal bankruptcy watchdog objected Friday to Southcross Energy's motion to file the personal information of some of its creditors under seal, arguing that hiding the material without proper justification violated transparency requirements.
Read full article »

EXPERT ANALYSIS

How The New FCA Cooperation Credit Guidelines Fall Short

Based on the May 7 guidance issued by the U.S. Department of Justice, the False Claims Act cooperation credit is like a box of chocolates — companies that self-report can't know what they are going to get in return, say Craig Margolis and Christian Sheehan at Arnold & Porter.
Read full article »

Takeaways From NYC Ban On Preemployment Marijuana Tests

New York City just enacted a first-of-its-kind law barring preemployment marijuana testing for all but a select few job categories, and employers should reasonably expect that at least some states or municipalities will follow, say Robert Nichols and Rebecca Baker of Bracewell.
Read full article »

Getting Out Of Legal Project Management Debt

If a client does not demand the application of project management techniques at the start of a matter, or a law firm does not routinely apply them, it is highly likely that additional, avoidable work — legal project management debt — will materialize throughout the matter, says Anthony Widdop of Shearman & Sterling.
Read full article »

LEXIS PRACTICE ADVISOR

Employer Considerations For Gov't Probes Of Senior Execs

There are various steps in-house and outside counsel should take when representing a company in a government investigation of a senior executive. Attorneys with Pierce Bainbridge and Sahn Ward share practical guidance for each part of the process.
Read full article »

Constangy Brooks
Cox Castle
Cozen O'Connor
Crowe & Dunlevy
Crowell & Moring
Crowley Fleck
Cullen & Dykman
Curtis Mallet-Prevost
DLA Piper
Davis & Gilbert
Davis Graham
Davis Polk
Davis Wright Tremaine
Day Pitney
Debevoise & Plimpton
Dechert
Dentons
Desai Law Firm PC
Dickie McCamey
Dickinson Wright
Dilworth Paxson
Dinsmore & Shohl
Dorsey & Whitney
Drew Eckl
Drinker Biddle
Duane Morris
Eckert Seamans
Ed Fox & Associates
Edelson PC
Epstein Becker Green
Eversheds Sutherland
Faegre Baker
Farella Braun
Fennemore Craig
Fenwick & West
Fish & Richardson
Fisher Phillips
FisherBroyles
Foley & Lardner
Foley & Mansfield
Foley Hoag
FordHarrison
Foster Pepper
Foster Swift
Fox Rothschild
Fredrikson & Byron
Freeborn & Peters
Fried Frank
Frost Brown Todd
Galloway Johnson
Garvey Schubert
Gibbons PC
Gibson Dunn

LEGAL INDUSTRY

Titan Of The Plaintiffs Bar: Katz Marshall's Debra S. Katz

The most closely watched moments of Debra S. Katz's career representing whistleblowers and victims of sexual harassment didn't take place in a courtroom. Instead, the nation watched as her client, Dr. Christine Blasey Ford, quietly testified before a Senate committee that now-Justice Brett Kavanaugh had held her down and assaulted her at a high school party more than 30 years ago.

Read full article »

How Litigation Funding Can Save, And Doom, Poor Plaintiffs

Companies that give cash advances on lawsuit settlements can help plaintiffs in need, but few are watching this growing industry, leaving a vulnerable population at the mercy of largely unregulated lenders.

Read full article »

Ex-Skadden Atty Craig Wants Illegal Lobbying Charges Tossed

Former Skadden partner Gregory Craig asked a D.C. federal court on Friday to throw out charges that he lied to federal officials who were probing work he did at the BigLaw firm as part of Paul Manafort's foreign lobbying effort for the government of Ukraine, calling them legally insufficient.

Read full article »

Hunton-Repped Utility Group Folds Amid House Investigation

A utility industry group represented by Hunton Andrews Kurth LLP said Friday that it would dissolve, as congressional Democrats investigate its activities and ties to former Hunton attorneys now serving as senior air officials in the U.S. Environmental Protection Agency.

Read full article »

Apple Dodges Atty's FaceTime Eavesdropping Suit

A Texas federal judge has tossed an attorney's suit alleging that a flaw in Apple's FaceTime app allowed someone to listen in and record a private deposition he had with a client, saying the lawyer hadn't shown that the product was unreasonably dangerous.

Read full article »

Dentons To Connect Attys With Behavioral Health Experts

Dentons is instituting a new behavioral health option for attorneys in Arizona, California and Hawaii that will allow lawyers to access therapists and psychiatrists through a mobile app, the firm has announced.

Read full article »

How A Diversity Fight Could Reshape A Canadian Law Society

Blowback to a diversity pledge requirement upended a recent Ontario law society election, with a sweeping victory by the pledge's opponents promising to shift Canada's biggest legal regulator to the political right.

Read full article »

GC Cheat Sheet: The Hottest Corporate News Of The Week

The U.S. Securities and Exchange Commission's Hester Peirce said the absence of "meaningful action" is stifling the cryptocurrency industry, and Littler Mendelson debuted a new technology tool to give clients quick and efficient counsel on workplace legal issues. These are some of the stories in legal news you may have missed in the past week.

Read full article »

In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week.

Godfrey & Kahn
Goldberg Segalla
Goodwin
Gordon & Rees
Goulston & Storrs
Gray Plant Mooty
Gray Reed
GrayRobinson
Greenberg Traurig
Greensfelder Hemker
Greenspoon Marder
Gunster
Hahn Loeser
Hall Booth
Hall Estill
Hall Render
Halloran & Sage
Hanna, Brophy, MacLean, McAleer & Jensen, LLP
Hanson Bridgett
Harness Dickey
Harris Beach
Harter Secrest
Hawkins Parnell
Haynes and Boone
Haynsworth Sinkler
HeplerBroom LLC
Herrick Feinstein
Heyl Royster
Hinckley Allen
Hinshaw & Culbertson
Hodgson Russ
Hogan Lovells
Holland & Hart
Holland & Knight
Howard & Howard
Hughes Hubbard
Hunton Andrews Kurth
Husch Blackwell
Ice Miller
Irell & Manella
Jackson Kelly
Jackson Lewis
Jackson Walker
Jaffe Raitt
Jeffer Mangels
Jenner & Block
Johnson & Bell
Johnson Trent
Jomarron Lopez
Jones Day
Jones Walker
K&L Gates

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Podcast

Law360's Pro Say: Justice, Outsourced

What happens when prosecutors effectively outsource a criminal probe to a BigLaw firm? A judge gets concerned, and we discuss the sticky situation on this week's Pro Say podcast.

Read full article »

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Philadelphia, Pennsylvania

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mid level L&E assoc/40 yr old 50 atty NYC firm
Schoen Legal Search
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Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Mid-sized White Plains firm seeks mid-senior litigation associate
KLR Davis
White Plains, New York

Employment Litigation Defense Attorney
Kaufman Dolowich & Voluck, LLP
Los Angeles, California

Labor & Employment Associate - (1+ yrs Exp.)
Jones Day
San Diego, California

Experienced Employment Associate
Lane Powell PC
Portland, Oregon

Associate Litigation Attorney (2-4 yrs.)
Gordon & Rees
Wilmington, Delaware

Litigation Associate
Keesal, Young & Logan
San Francisco, California

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Employment Litigation Associate
Ogletree Deakins Law Firm
Washington, District of Columbia

NYC Big-Law litigation assoc (3-4 yrs exp)
KLR Davis
New York, New York

Karpf Karpf
Kasowitz Benson
Katten Muchin
Katz Marshall
Kaufman Borgeest
Kaufman Dolowich
Kean Miller
Keating Muething
Kelley Drye
Kelley Kronenberg
Kelly Hart
Kilpatrick Townsend
King & Spalding
Kirkland & Ellis
Kirton McConkie
Knobbe Martens
Kramer Levin
Kutak Rock
Lane Powell
Latham & Watkins
Lathrop Gage
Laughlin Falbo
LeClairRyan
Lenczner Slaght
Lewis Brisbois
Lewis Rice
Lewis Roca
Linebarger Goggan
Liskow & Lewis
Litchfield Cavo
Littler Mendelson
Locke Lord
Loeb & Loeb
Lowenstein Sandler
Lozano Smith
Lydecker Diaz
Manatt Phelps
Manning & Kass
Margolis Edelstein
Marshall Dennehey
Mayer Brown
Maynard Cooper
McAfee & Taft
McAngus Goudelock
McCalla Raymer
McCarter & English
McDonald Hopkins
McElroy Deutsch
McGlinchey Stafford
McGuireWoods
McKool Smith
McLane Middleton
McNees

Michael Best
Miles & Stockbridge
Miller & Martin
Miller Canfield
Miller Nash
Mitchell Silberberg
Mitchell Williams
Modus Law
MoloLamken LLP
Montgomery McCracken
Moore & Van Allen
Morgan & Morgan
Morgan Lewis
Morris Bart
Morris Manning
Morris Nichols
Morrison & Foerster
Morrison Cohen
Morrison Mahoney
Munger Tolles
Munsch Hardt
Neal Gerber
Nelson Mullins
Nexsen Pruet
Nixon Peabody
Norris McLaughlin
Norton Rose Fulbright
Nutter McClennen
O'Hagan Meyer
Obermayer Rebmann
Offit Kurman
Ogletree Deakins
Orrick Herrington
Parker Poe
Parsons Behle
Patterson Belknap
Paul Hastings
Paul Weiss
Peckar & Abramson
Pepper Hamilton
Perkins Coie
Phelps Dunbar
Phillips & Cohen
Phillips Lytle
Pierce Atwood
Pierce Bainbridge
Plunkett Cooney
Polsinelli
Porter Hedges
Porter Wright
Post & Schell
Potter Anderson
Poyner Spruill

Procopio Cory
Proskauer Rose
Pryor Cashman
Quarles & Brady
Quinn Emanuel
Quintairos Prieto
Rawle & Henderson
Reed Smith
Reinhart Boerner
Richards Layton
Riker Danzig
Rivkin Radler
Robbins Geller
Robins Kaplan
Robinson & Cole
Robinson Bradshaw
Roetzel & Andress
Ropers Majeski
Ropes & Gray
Rutan & Tucker
Sahn Ward
Sandberg Phoenix
Sanford Heisler
Saul Ewing
Schiff Hardin
Schnader Harrison
Schulte Roth
Schwabe Williamson
Schwegman Lundberg
Segal McCambridge
Seward & Kissel
Seyfarth Shaw
Shearman & Sterling
Sheppard Mullin
Sherman & Howard
Shipman & Goodwin
Shook Hardy
Shumaker Loop
Shutts & Bowen
Sidley Austin
Sills Cummis
Simmons Hanly
Simpson Thacher
Sirote & Permutt
Skadden
Smith Anderson
Smith Gambrell
SmithAmundsen LLC
Snell & Wilmer
Spencer Fane
Spilman Thomas
Squire Patton Boggs
Stagg Terenzi

Stearns Weaver
Stephan Zouras
Steptoe & Johnson LLP
Steptoe & Johnson PLLC
Sterne Kessler
Stevens & Lee
Stinson Leonard
Stites & Harbison
Stoel Rives
Stoll Keenon
Stradley Ronon
Stradling Yocca
Strasburger & Price
Sullivan & Cromwell
Sullivan & Worcester
Susman Godfrey
Swanson Martin
Swift Currie
Taft Stettinius
Taylor English
Thompson & Knight
Thompson Coburn
Thompson Coe
Thompson Hine
Troutman Sanders
Tucker Ellis
Tyson & Mendes
Ulmer & Berne
Vedder Price
Venable LLP
Vernis & Bowling
Verrill Dana
Vinson & Elkins
Vorys Sater
Wachtell Lipton
Waller Lansden
Warner Norcross
Weber Gallagher
Weitz & Luxenberg
Wheat Oppermann
Wheeler Trigg
White & Case
White and Williams
Whiteford Taylor
Wiggin and Dana
Wilentz Goldman
Wiley Rein
Williams & Connolly
Williams Mullen
WilmerHale
Wilson Elser
Wilson Sonsini
Windels Marx

Winstead PC
Winston & Strawn
Winthrop & Weinstine
Wolf Greenfield
Womble Bond Dickinson
Wood Smith
Woods Oviatt
Wyatt Tarrant
Young Conaway
Zuckerman Spaeder
von Briesen

COMPANIES

AT&T Inc.
Abiomed Inc.
Altman Weil Inc.
Ameren Corp.
American Arbitration Association
American Electric Power Co. Inc.
American Federation of Labor and Congress of Industrial Organizations
Apple Inc.
BTI Consulting Group Inc.
BuzzFeed Inc.
DTE Energy Co.
Deloitte Touche
Deutsche Bank AG
EOG Resources Inc.
EQT Corp.
Epic Systems Corp.
Facebook
FirstEnergy Corp.
Fresenius Kabi AG
GlaxoSmithKline
Google Inc.
Huawei Technologies
International Association of Privacy Professionals
International Brotherhood of Teamsters
Kirkland's, Inc.
Kronos Incorporated
Meritor Inc.
NFL Enterprises LLC
National Employment Law Project
National Women's Law Center
New York Times Co.
Panera Bread Company
Pinterest Inc.
Platinum Partners LP
Ports America Inc.
Reed Elsevier
Sephora SA

Spotify Technology SA
St. Luke's University Health Network
T-Mobile USA Inc.
The Southern Company Inc.
U.S. Chamber of Commerce
UnitedLex Corp.
Verizon Communications Inc.
Vistra Energy Corp.
Yahoo! Inc.
ZTE Corp.

GOVERNMENT AGENCIES

California Supreme Court
Consumer Financial Protection Bureau
Delaware Court of Chancery
Federal Acquisition Regulatory Council
Federal Bureau of Investigation
Federal Reserve System
Federal Trade Commission
National Labor Relations Board
New York Attorney General's Office
New York City Council
Office of Foreign Assets Control
Ontario Securities Commission
Securities and Exchange Commission
Social Security Administration
Tennessee Valley Authority
U.S. Attorney's Office
U.S. Department of Justice
U.S. Department of Transportation
U.S. Environmental Protection Agency
U.S. House Committee on Energy and Commerce
U.S. House of Representatives
U.S. Supreme Court
United States Bankruptcy Court for the District of Delaware
United States Court of Appeals for the Third Circuit

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From: Employment Law360
To: Ring, John
Subject: Law360 Reveals Titans Of The Plaintiffs Bar & Roberts Seen As Swing Vote In High Court LGBT Rights Case
Date: Monday, May 6, 2019 3:54:30 AM

EMPLOYMENT

Monday, May 6, 2019

TOP NEWS

Law360 Reveals Titans Of The Plaintiffs Bar

They're global managing partners, lecturers in law, parents and former state prosecutors whose work in large-scale litigation has led to landmark victories and record-breaking deals. Law360 is honoring 10 influential plaintiffs lawyers who are champions in the courtroom and leaders in and outside their firms.

Read full article »

Analysis

Roberts Seen As Swing Vote In High Court LGBT Rights Case

Though it's anyone's guess how the U.S. Supreme Court will rule on the question of whether LGBT workers are protected by Title VII's prohibition on sex discrimination, experts say Chief Justice John Roberts will likely be the one who casts the deciding vote in what's expected to be a blockbuster 5-4 decision.

Read full article »

Recently Confirmed Judge Up For 3rd Circ. Promotion

President Donald Trump on Friday tapped a former Jones Day associate recently confirmed to a Pennsylvania federal district court for elevation to the Third Circuit, and named a Quinn Emanuel partner for a seat on the Texas federal bench in his latest round of nominations.

Read full article »

Neb. Firefighter's 'Shocking' $930K Distress Award Cut Down

A Nebraska federal judge slashed a fire captain's $1.2 million award for retaliation by more than half on Thursday, saying the $930,000 the jury awarded him for future emotional distress after the city of Lincoln retaliated against him for reporting harassment was "shocking and excessive."

Read full article »

Worker Penalized Under Wrong Union Contract, NRLB Says

A split National Labor Relations Board has found a marine container terminal operator and its bargaining representative couldn't legally apply anti-bias policies contained in a contract with one union to resolve alleged misconduct by a worker who was part of a different bargaining unit.

Read full article »

DISCRIMINATION

VW AG Can't Shake Suit Alleging Global Age Bias Policy

Volkswagen AG can't escape a worker's suit alleging it instituted a policy to rid the company of older employees as part of a rebranding strategy after a Tennessee federal judge rejected the German automaker's challenge to his ability to hear the case.

Read full article »

WAGE & HOUR

Law360 Pro Say Podcast

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New Cases

Discrimination (65)
ERISA (38)
Labor (52)

LAW FIRMS

Allen Garrett
Atkinson Andelson
Baker McKenzie
Beck Redden
Berger Montague
Bernstein Litowitz
Caldwell Cassady
Davis Polk
Del Sole Cavanaugh
Dentons
Drinker Biddle
Eversheds Sutherland
Fee Smith
Fox Rothschild
Gibson Dunn
Hagens Berman
Healey & Hornack
Hinckley Allen
Hogan Lovells
Jackson Lewis
Jones Day
Katz Marshall
Kilpatrick Townsend
King & Spalding

Amazon Delivery Drivers Defend Cert. Bid In Wage Action

Amazon delivery drivers in Florida objected to a federal magistrate judge's recommendation against certifying a nationwide collective action accusing the e-commerce titan of shorting them on pay, saying Amazon's actions harmed drivers in the same way across the country.

Read full article »

LABOR

New Leader Drops Pa. Print Union's Suit Against Parent Org

A Pittsburgh-based union for printers, publishers and media workers on Friday withdrew its effort to force its parent union, the Communications Workers of America, into arbitration over staffing and threats of dissolution, after the CWA appointed a new leader who ordered a federal lawsuit against the parent union dropped.

Read full article »

NONCOMPETES

Riddell Aims To Block Ex-Star Salesman From Poaching Reps

Football helmet developer Riddell Inc. urged an Illinois federal judge Friday to bar a former top salesman and a rival sports gear company from soliciting Riddell employees and customers, saying the ex-sales rep is a "sophisticated party" who knew what he was doing when he signed a noncompete agreement.

Read full article »

TRADE SECRETS

Alifax Wins $6.5M In Dispute Over Blood Testing Trade Secret

A federal jury awarded Italian clinical diagnostics company Alifax $6.5 million on Thursday over a former employee's alleged theft of blood testing trade secrets in a move to a competitor, Alcor Scientific.

Read full article »

WORKER PRIVACY

United Asks To Keep Worker's Biometric Suit In Federal Court

United Airlines Inc. has asked the Seventh Circuit to reverse a lower court's order finding that its workers had no federal standing to challenge its biometric timekeeping system, saying the dispute doesn't belong in state court.

Read full article »

Insurer Won't Cover Costs Of Employee Fingerprint Suit

A New Jersey-based insurer asked an Illinois federal judge Friday to declare that it has no duty to defend or indemnify a hospital housekeeping company in two lawsuits accusing it of violating informed consent provisions in the state's biometric privacy law.

Read full article »

NEGLIGENT HIRING

Texas Justices Side With Energy Co. In Negligent-Hiring Row

The Texas Supreme Court determined Friday that the rules limiting a property owner's liability for contractors' injuries can extend to a negligent-hiring claim, ending a lawsuit against Endeavor Energy Resources LP over a contract employee's death at a drill site.

Read full article »

EXPERT ANALYSIS

Latham & Watkins
Locke Lord
Lukins & Annis
Marshall Gerstein
McGuire Law PC
Miller & Martin
Morgan & Morgan
Morgan Lewis
Morrison & Foerster
Norton Rose Fulbright
Ogletree Deakins
Organ Cole
Orrick Herrington
Panish Shea
Paul Weiss
Pierce Atwood
Quinn Emanuel
Reed Smith
Robbins Geller
Sanford Heisler
Scherr Legate
Seyfarth Shaw
Skadden
Susman Godfrey
The Spiggle Law Firm
Wargo & French
Warshaw Burstein
Weinberg Roger
White and Williams
Winston & Strawn

COMPANIES

Amazon.com Inc.
American International Group Inc.
Bristol-Myers Squibb Co.
Burger King Holdings Inc.
CME Group Inc.
Communications Workers of America
Credit Suisse Group AG
Crum & Forster Holdings Corp.
Deutsche Bank AG
Equifax Inc.
ExlService Holdings, Inc.
Facebook
Google Inc.
International Association of Privacy Professionals
International Longshore and Warehouse Union
MF Global Holdings Ltd.
Major Lindsey & Africa
Match Group Inc.
Mattel Inc.

2 New Efforts To Clarify Employee Cannabis Drug Testing

The vacuum of federal guidance concerning employee cannabis drug tests has cultivated considerable confusion for employers. Attorneys at Eversheds Sutherland discuss two recent proposals in NYC and Congress that attempt to address this issue.

Read full article »

Opinion

New Title IX Rules Would Protect Due Process

While the U.S. Department of Education's proposed changes to Title IX regulations may be imperfect, they present a fairer system with clear standards that can ensure the integrity of results for all parties in Title IX proceedings, says Kimberly Lau of Warshaw Burstein.

Read full article »

LEGAL INDUSTRY

Analysis

Why Are Law Clerks So White?

White students make up 58% of graduates from the nation's top 30 law schools but more than 80% of federal judicial clerkships. Judges and academics are setting out to conduct the first major study that could explain why.

Read full article »

Legal Industry Shed 700 Jobs In April

The legal industry lost 700 jobs in April, representing a slight dip after reaching a post-Great Recession high the previous month, a new government report says.

Read full article »

Mueller Team Member Greg Andres To Rejoin Davis Polk

After 20 months spent working alongside special counsel Robert Mueller to investigate Russian interference into the 2016 presidential election, Greg Andres is going back to Davis Polk & Wardwell LLP, the firm announced Friday.

Read full article »

Dentons Launches Program To Incentivize Atty Innovation

Global law firm Dentons announced Friday it has launched a new "innovation acceleration" program to incentivize its attorneys to innovate on behalf of clients and the firm, including through the use of advancing technologies like artificial intelligence and automation.

Read full article »

Nestle Hires Shell Compliance Officer As General Counsel

Nestle has appointed Royal Dutch Shell PLC's prior chief ethics and compliance officer as its new general counsel and executive vice president and as a member of Nestle SA's executive board, the company announced on Friday.

Read full article »

GC Cheat Sheet: The Hottest Corporate News Of The Week

A survey showed that many organizations likely won't be in compliance with the California Consumer Privacy Act when it takes effect next year, and a filing revealed that Google paid its parent company's chief legal officer $47.2 million in 2018 despite a scandal-filled year. These are some of the stories in legal news you may have missed in the past week.

Read full article »

In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and

NBCUniversal Inc.
Nestle
New York Times Co.
Panasonic Corporation
Petrobras
Purdue Pharma LP
Quicken Loans Inc.
Riddell Sports Group Inc.
Royal Bank of Canada
Royal Dutch Shell PLC
Spotify Technology SA
The Hershey Co.
Title Source Inc.
Turner Broadcasting System Inc.
United Continental Holdings Inc.
Volkswagen
Wal-Mart Stores Inc.
Wells Fargo & Co.
Wilmington Trust Corp.

GOVERNMENT AGENCIES

Bureau of Labor Statistics
California Supreme Court
Equal Employment Opportunity Commission
Executive Office of the President
Information Commissioner's Office
National Labor Relations Board
New York Attorney General's Office
New York City Council
Office of Foreign Assets Control
Securities and Exchange Commission
Texas Supreme Court
U.S. Department of Education
U.S. Department of Justice
U.S. Supreme Court

expert analyses that generated the most buzz on Law360 last week.
Read full article »

Podcast

Law360's Pro Say: A 'Barbaric' Recusal

A Miami federal judge issued an extraordinary recusal order this week, saying he couldn't preside over a case against UnitedHealthcare because he believes the company's refusal to pay for cancer treatments is "immoral and barbaric." We'll discuss the recusal drama on this week's Pro Say podcast.
Read full article »

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U.S. Securities & Exchange Commission
Washington, District of Columbia

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KLR Davis
White Plains, New York

Employment Litigation Associate
Ogletree Deakins Law Firm
Washington, District of Columbia

Employment Litigation Defense Attorney
Kaufman Dolowich & Voluck, LLP
Los Angeles, California

NYC Big-Law litigation assoc (3-4 yrs exp)
KLR Davis
New York, New York

Labor & Employment Associate - (1+ yrs Exp.)
Jones Day
San Diego, California

mid level L&E assoc/40 yr old 50 atty NYC firm
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From: Martin, Andrew
Subject: Law360: Telling Worker "Shut Up" Not Anti-Union Animus, NLRB Says
Date: Friday, May 24, 2019 9:27:07 AM
Attachments: image001.png

Telling Worker 'Shut Up' Not Anti-Union Animus, NLRB Says

By Kevin Stawicki

Law360 (May 23, 2019, 6:52 PM EDT) -- Electrolux Home Products didn't violate federal labor law when it fired a worker managers told to "shut up" during a captive-audience meeting, the NLRB ruled, concluding that while that treatment may have been rude, it didn't establish union animus.

A three-member panel on Wednesday overturned an administrative law judge's 2018 decision that Electrolux Home Products Inc. illegally fired J'vada Mason because she participated in a union organizing campaign at the gas and electric oven manufacturing facility in Memphis, Tennessee.

Mason's 2017 firing for failing to deliver microwaves to the production line had nothing to do with a heated exchange during a meeting to dissuade workers from joining the International Brotherhood of Electrical Workers when Mason's managers told her to "shut up" and said she didn't know what she was talking about when she challenged their stance, the panel said.

"Respondent's attempt to limit its captive-audience meeting to the expression of its own views by telling the charging party to 'shut up,' rude as it may have been, does not by itself, or in conjunction with the evidence of disparate treatment, establish that the respondent harbored union animus," the panel wrote.

Just because Electrolux knew Mason was engaged in two union organizing drives doesn't mean the company had her firing in mind from the start, the panel said. And while it's likely that Mason's supervisors treated her colleagues more leniently for similar infractions, which "tends to show" their reason for firing Mason was pretextual, the panel said that's not enough to conclude the real reason for firing Mason was her union involvement.

"The records themselves are sparse on details, and the general counsel did not introduce

any testimonial evidence elaborating on the circumstances of the comparators' insubordination," the panel wrote.

Mason was hired in 2013 and moved up the ranks at the facility of over 700 bargaining workers to become a team lead in the materials department, where she helped keep the assembly lines stocked for production, receiving one positive performance review and two disciplinary actions for failing to clock-in and improperly scanning an item, according to the opinion.

By the time IBEW was certified as the exclusive bargaining representative at the Memphis warehouse in 2016, Mason was fully engaged in the bargaining process, at one point standing up during an anti-union meeting to challenge the plant manager's statements about strikes at the plant when her managers told her to "shut up," according to the opinion.

Shortly after Mason became a member of the negotiating team, her supervisor reported that she ignored a request to take some microwaves to an assembly line and initiated an investigation into insubordination, which ended in her termination.

Representatives for the parties did not immediately respond to requests for comment Thursday.

The NLRB General Counsel is represented in-house by Linda M. Mohns.

Electrolux is represented by Reyburn W. Lominack III and Stephen C. Mitchell of Fisher Phillips.

The case is Electrolux Home Products Inc. and J'vada Mason, case number 15–CA–206187, before the National Labor Relations Board.

--Editing by Jack Karp.

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From: Martin, Andrew
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Date: Wednesday, May 1, 2019 7:49:23 AM

Wednesday, May 1, 2019

Labor Secretary Faces Democrats on Pay Rules, Ethics

BloombergLaw - Daily Labor Report 01 May 2019 07:06

By Patricio Chile Labor Secretary Alexander Acosta is doing double duty on Capitol Hill this week, starting with a House Education and Labor Committee hearing this morning. Acosta is also slated Thursday to go before a Senate Appropriations subcommittee....

Volkswagen Union Vote Sees New Hurdle With Anti-UAW Group

BloombergLaw - Labor Relations News 01 May 2019 06:27

• Group helped bring union defeat in 2014 • Unclear who is backing the organization By Andrew Wallender An anti-union group that was a key player in defeating the United Auto Workers' 2014 bid to represent workers at Volkswagen 's Chattanooga, Tenn.,...

After reporting noose, woman says she lost job

Greenville News [Greenville Online] (Greenville, SC) 01 May 2019 06:11

DETROIT — Charlene Lust says she has no doubt that what she saw in a Michigan auto plant in February was a noose . Seeing the rope hanging in an area where she was coming to help a coworker clean up, Lust said she was overcome by a feeling of sadness. "I...

House Panel Boosts Labor-HHS-Education Funds: BGOV Closer Look

BloombergLaw - Health Law & Business News 01 May 2019 05:57

By Danielle Parnass The Labor, Health and Human Services, and Education departments, along wi h related agencies, would receive $189.8 billion in discretionary funding in fiscal 2020 under the House Appropriations Committee's draft spending bill . That...

Unionizing the World's Largest Slaughterhouse

Monthly Review 01 May 2019 03:40

Lynn Waltz, Hog Wild: The Battle for Workers' Rights at the World's Largest Slaughterhouse (Iowa City: University of Iowa Press, 2018), 288 pages, $24.95, paperback. Capitalism has many victims, but few fare as badly as slaughterhouse workers. Every day,...

LIFE AFTER JANUS

Columbia Law Review 30 Apr 2019 21:24

The axe has finally fallen. In Janus v. American Federation of State, County, & Municipal Employees, Council 31, the Supreme Court struck down the major source of financial security enjoyed by public-sector unions, which represent nearly half of the...

Software engineers at prominent tech firm say they were fired for trying to unionize: Report

Salon (San Francisco, CA) 30 Apr 2019 19:38

Silicon Valley's recent labor pains have been largely confined to blue collar contractors in gig economy–reliant companies like Uber and Lyft. But this week, an unusual case is bubbling up in Silicon Valley that could set a precedent for software...

Budget Hike for Labor Department, NLRB Gets House Subcommittee OK

BloombergLaw - Daily Labor Report 30 Apr 2019 17:26

• Democrat-controlled subcommittee OKs spending increases for DOL, NLRB • Bill advances to full committee By Tyrone Richardson and Hassan A. Kanu A House appropriations subcommittee April 30 approved legislation that would increase 2020 discretionary...

Obama-Era Joint Employer Test Belongs in Dustbin: NLRB Lawyers

BloombergLaw - Daily Labor Report 30 Apr 2019 16:37

• Appeals court ruling doesn't constrain NLRB, lawyers say • GOP-led board appears poised to narrow joint employer test By Robert Iafolla The National Labor Relations Board should scrap the contentious Obama-era test for determining joint employer...

Elder Care Company Targeted Union Members for Firing, Demotion

BloombergLaw - Daily Labor Report 30 Apr 2019 12:17

• Organizing efforts led to backlash against workers • Company undercut bargaining process By Porter Wells A Washington state home-care company unlawfully disciplined four of its employees during a unionization push and must now bargain with the union,...

From: Martin, Andrew
Subject: Legal News FYI 05-02-19
Date: Thursday, May 2, 2019 8:12:16 AM
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Thursday, May 2, 2019

Labor Board Top Lawyer Puts Focus on Unions

BloombergLaw - Daily Labor Report 02 May 2019 07:06

By Patricio Chile The National Labor Relations Board's top lawyer is reviving unfair labor practice cases brought against unions at seven times he rate he's reviving such cases filed against employers during this fiscal year, according to a Bloomberg...

Trump's Top Labor Lawyer Seeking Pro-Labor Findings to Overturn

BloombergLaw - Daily Labor Report 02 May 2019 06:36

• GC's office can countermand career staff on issuing complaints • Current general counsel has issued directives focused on unions By Robert Iafolla The National Labor Relations Board's general counsel is on pace this fiscal year to revive seven times...

NLRB Publishes Advice Memo Finding that Company Maintained Unlawfully Overbroad Work Rules But Did Not Violate

JD Supra Law News 01 May 2019 19:57

Seyfarth Synopsis: The NLRB's Division of Advice recently released an Advice Memorandum finding that a security company's work rules were unlawfully overbroad, but that the company did not violate the National Labor Relations Act by discharging one of...

Google's employee rebellion expands with same-day actions on two fronts

East Bay Times (San Francisco, CA) 01 May 2019 18:18

Google workers angry about the firm's employment practices and its handling of internal criticism held two protest actions Wednesday, fighting forced arbitration and alleged retaliation against organizers of a massive walkout in November. At one protest...

Case: Labor Relations/Discrimination (D.C. Cir.)

BloombergLaw - Daily Labor Report 01 May 2019 16:16

The NLRB properly found that Kitsap Tenant Support Services unlawfully disciplined four employees during and after a successful unionization campaign among its caregivers. Substantial evidence supports the board's finding that Kitsap increased its...

Blog Post: NLRB's Top Lawyer Asks Board To Scuttle Joint Employer Test

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 01 May 2019 15:36

The National Labor Relations Board's top attorney has urged the board's four sitting members to nix the expanded joint employment test laid out in its 2015 Browning-Ferris Industries ruling and say a business must have "direct control" over workers...

Lights out for class arbitration – Lamps Plus holds that class arbitration cannot be read into ambiguous

JD Supra Law News 01 May 2019 15:18

Consistent with prior US Supreme Court opinions, the Supreme Court held on April 24, 2019, that contractual ambiguity regarding class arbitration may not be construed against the drafter because of Federal Arbitration Act (FAA) preemption. Lamps Plus,...

Blog Post: New Clarity From NLRB On Successor Bargaining Duties

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 01 May 2019 11:55

The National Labor Relations Board's recent Ridgewood Health Care Center decision will benefit successor employers in escaping so-called perfectly clear successor liability, providing flexibility following an acquisition of a business with a unionized...

Workers in Mexico just won the right to organize real labor unions. Trump helped.

VOX 01 May 2019 11:39

May 1 is International Workers' Day, and employees in Mexico have good reason to celebrate: They just won the right to organize and negotiate heir own pay. Mexican President Andrés Manuel López Obrador enacted a labor reform bill Wednesday that for he...

Blog Post: Volvo Group Must Reinstate Worker Axed For Union Support

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 01 May 2019 11:23

A National Labor Relations Board judge has ordered Volvo Group North America to rehire a Mississippi industrial worker fired, ostensibly, for breaking a rule against backing in or out of warehouse aisles, saying his firing came after a series of trumped...

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Date: Friday, May 3, 2019 7:38:40 AM
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Friday, May 3, 2019

WIRTW #551 (the “he went for the head” edition)

Kohrman Jackson & Krantz : Ohio Employer's Law Blog 03 May 2019 07:05

#DontSpoilTheEndGame Really! DON’T SPOIL ENDGAME. A Friendswood, Texas, Domino’s employee learned this lesson the hard way. He was cited by police after he assaulted a co-worker for revealing an Avengers: Endgame spoiler. According to ABC13, no one at...

Speak No Evil No More? Non-Disparagement Edicts Lose Favor

BloombergLaw - Daily Labor Report 03 May 2019 06:07

• States target non-disparagement wording in contracts • Some say the agreements stifle workers’ voices By Erin Mulvaney The #MeToo movement and protests against large technology companies have drawn new attention to policies that discourage workers from...

'It's because we were union members': Boeing fires workers who organized

Guardian, The (London, England) 03 May 2019 02:35

Richard Mester worked for Boeing in South Carolina as a flight safety inspector for five years before being suddenly fired – along with two other employees – in November 2018 for allegedly failing to report a bird strike. However, the bad news also came...

#No Filter: Terminating an Employee for Social Media Posts

Lexology 02 May 2019 19:00

Prior to the advent of social media and especially the #MeToo movement, employers were generally comfortable drawing a bright line between what employees did on their own time and workplace misconduct. Those bygone times, however, have been replaced by a...

The PRO Act: Giving workers more bargaining power on the job

Economic Policy Institute 02 May 2019 16:37

Our economy is out of balance. Corporations and CEOs hold too much power and wealth, and working people know it. Workers are mobilizing, organizing, protesting, and striking at a level not seen in decades, and they are winning pay raises and other real...

Democrats’ New Labor Bill May Test White House Hopefuls

BloombergLaw - Daily Labor Report 02 May 2019 16:37

Congress • Bill would bolster organizing rights, prohibit misclassification • Proposal may serve as candidate barometer in 2020 By Jaclyn Diaz Congressional Democrats are proposing a far-reaching bill that would bolster workers’ organizing rights,...

Trump’s Top Labor Lawyer Seeking Pro-Union Findings to Overturn

Bloomberg Law : Big Law Business 02 May 2019 06:30

The National Labor Relations Board’s general counsel is on pace his fiscal year to revive seven times more unfair labor practice cases that were brought against unions than against employers, driven in part by direc ives he’s issued calling for stricter...

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Monday, May 6, 2019

DOL Endorses Independent Contractor Status in the Gig Economy

Lexology 06 May 2019 07:09

, the U.S. Department of Labor ("DOL") issued an opinion letter concluding that workers providing services to customers referred to them through an unidentified virtual marketplace are properly classified as independent contractors under the Fair Labor...

Workers Ousting Unions Get Labor Board Boost

BloombergLaw - Daily Labor Report 06 May 2019 07:06

By Patricio Chile School bus drivers in Rhode Island trying to oust their union are turning to the National Labor Relations Board for help. Their case might add to a broader effort to make it easier for U.S. workers to decertify unions they want to...

Punching In: Heavy Is the Head that Wears the EEOC Crown

BloombergLaw - Daily Labor Report 06 May 2019 06:17

By Chris Opfer and Jaclyn Diaz Monday morning musings for workplace watchers Janet Takes the Chair | Apprenticeship Week? | Look Who's Interviewing at the NLRB Chris Opfer: It's a big week for the Equal Employment Opportunity Commission, which could have...

Boeing, Accused Of Union-Busting, Really Going For Some Sort Of 'Worst Company' Award

Gizmodo Australia (Blog) 04 May 2019 00:20

With an entire line of its planes grounded following several, likely preventable air disasters that cost hundreds of passengers their lives, Boeing has decided to kick itself while it's down by engaging in what three ex-workers are calling retaliatory...

Michael Hiltzik: Trump's Labor secretary comes out against giving workers a raise

Los Angeles Times (Los Angeles, CA) 03 May 2019 23:32

May 03-- May 3 -- Alexander Acosta may bear he title of U.S. secretary of Labor, but you wouldn't know it from the policies he has implemented as head of the one Cabinet -level department explicitly devoted to the welfare of American workers. Since...

The Modern Honolulu hotel slapped with federal charges for worker lay off

eTurboNews 03 May 2019 21:20

The Modern Honolulu recently notified 78 workers—nearly 30% of he workers at the hotel—that they will be laid off within the next 30 days. Federal charges assert that The Modern violated employees' federal labor law rights and refused to bargain in good...

Unions for Mercy Health St. Vincent workers file unfair labor practice charge

Blade, The (Toledo, OH) 03 May 2019 18:40

United Auto Workers Locals 12 and 2213, which represent nearly 1,900 workers at Mercy Health St. Vincent Medical Center, on Friday filed an unfair labor practice complaint against the hospital. The charge filed with the National Labor Relations Board...

Blog Post: Worker Penalized Under Wrong Union Contract, NRLB Says

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 03 May 2019 17:10

A split National Labor Relations Board has found a marine container terminal operator and its bargaining representative couldn't legally apply anti-bias policies contained in a contract with one union to resolve alleged misconduct by a worker who was...

Volkswagen Tennessee Union Bid on Hold in Big Defeat for UAW (2)

BloombergLaw - Daily Labor Report 03 May 2019 16:06

• NLRB order offers no detailed reason for the stay • VW: An unresolved 2015 election precluded a new vote By Andrew Wallender and Chris Opfer Volkswagen will escape a second unionization effort at its Chattanooga, Tenn., plant for the time being after...

Shipping Terminal Company Used Wrong Union's Rules, NLRB Finds

BloombergLaw - Daily Labor Report 03 May 2019 14:57

• Ruling clarifies duties in mul i-union workplace • Unusual NLRB configuration decided case By Robert Iafolla A Southern California shipping terminal operator applied the wrong union's workplace rules to resolve allegations that one worker harassed...

Challenges to Union Fees Made Easier by Top NLRB Lawyer (2)

BloombergLaw - Daily Labor Report 03 May 2019 12:36

• New directive shifts a burden to unions to provide evidence • Another GC initia ive focused on scrutinizing organized labor By Robert Iafolla The National Labor Relations Board's top lawyer made it easier for workers represented by unions but aren't...

Judge rules against DMC Huron-Valley hospital in nurses' labor board complaint

Crain's Detroit Business (Detroit, MI) 03 May 2019 11:13

National Labor Relations Board Administrative Law Judge Ar hur Amchan has issued a recommended order that DMC Huron-Valley Sinai Hospital violated two labor prac ice laws when it refused to allow nurses to combine two break periods into one and for...

With PRO Act, Democrats Commit to Dramatic Labor Reforms

New York Magazine (New York, NY) 03 May 2019 10:16

Forty Senate Democrats joined 100 of their House colleagues on Thursday to introduce a sweeping new piece of pro-union legislation. The Protec ing he Right to Organize Act, or PRO Act, would shore up workers' rights to strike, to organize, and to pursue...

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Tuesday, May 7, 2019

NLRB Publishes Advice Memo Finding That Company Maintained Unlawfully Overbroad Work Rules But Did Not Violate NLRA By Discharging Employee For Facebook Video Or Filing Defamation Suit Against Two Former Employees

Mondaq Business Briefing 07 May 2019 00:08

Seyfarth Synopsis : The NLRB's Division of Advice recently released an Advice Memorandum finding that a security company's work rules were unlawfully overbroad, but that the company did not violate the National Labor Relations Act by discharging one of...

California Gig Economy Employers Should Approach the Department of Labor's Recent Opinion Letter With Caution

JD Supra 06 May 2019 17:10

, the Department of Labor's Wage and Hour Division ("WHD") issued an employer-friendly Opinion Letter. In this Opinion Letter, WHD considered whether service providers for a virtual marketplace company ("VMC") are independent contractors or employees...

Many assume salary transparency will benefit employees, but research suggests downsides, too

Harvard Business School 06 May 2019 15:29

Wage stagnation — along with the persistent underpaying of women and minorities rela ive to their white male counterparts — has increased calls for pay transparency in the economy. Don't markets operate better with free and equal access to information?...

My employee posted on Facebook about me — and not in a good way. Can I fire him?

Alaska Dispatch News (Anchorage, AK) 06 May 2019 14:00

Q: I recently learned that one of my employees described me on his Facebook page as the worst supervisor he's ever worked for. According to my source, the employee also said he'd like to dissect me like a frog to find out whether I have a heart. I called...

Kickstarter Workers Kick Off a Union Organizing Drive; NPM Allegedly Fires Engineers for Organizing Efforts

Spectrum Online 06 May 2019 12:55

- IEEE Spectrum 6 May 2019 | 16:15 GMT Just a year after Lanetix fired 14 engineers for union organizing, tech workers lead two more unionization efforts Illustration: Davor Pavelic/ Editor's Picks In January of 2018, Lanetix , a company that creates...

Union bill would undo Epic, codify Browning-Ferris

HR Dive 06 May 2019 11:41

Brief Published May 6, 2019 Dive Brief: Congressional Democrats Thursday introduced companion bills that, in addition to increasing union protections, would undo the U.S. Supreme Court's ruling in Epic Systems Corp. v. Lewis and redefine joint employment...

Judge rules in favor of Huron Valley-Sinai nurses regarding breaks in ongoing battle

Rochester MI Eccentric 06 May 2019 10:31

A judge recently determined that Huron Valley-Sinai Hospital engaged in unfair labor practices with its nurses by suddenly enforcing a prohibition against combining meal and rest breaks. Judge Arthur J. Amchan said in his decision the Commerce Township...

Democrats' New Labor Bill May Test White House Hopefuls

BloombergLaw - Construction Labor News 02 May 2019 16:27

Congress • Bill would bolster organizing rights, prohibit misclassification • Proposal may serve as candidate barometer in 2020 By Jaclyn Diaz Congressional Democrats are proposing a far-reaching bill that would bolster workers' organizing rights,...

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Thursday, May 9, 2019

Gig Worker Letter Prompts Pushback from Some States

BloombergLaw - Daily Labor Report 09 May 2019 07:06

By Patricio Chile A key question growing from he rise of the gig economy is whether workers in these industries are employees or independent contractors. A recent Trump administration opinion letter said these workers should be considered contractors...

Law student receives prestigious fellowship

University of Toledo (Toledo, OH) 09 May 2019 05:00

Prince Senayah, a second-year law student at The University of Toledo College of Law, recently was awarded a 10-week public interest labor law fellowship by the Peggy Browning Fund. Senayah will spend the summer working at United Auto Workers (UAW)...

Illinois House bill would classify graduate and research assistants as employees

Daily Northwestern (Evanston, IN) 09 May 2019 01:12

A House bill making its way through the state Senate would give graduate and research assistants the same labor rights as other educational employees. The bill, sponsored by state Sen. Laura Fine (D-Glenview), would give graduate and research assistants...

AFL-CIO Chief, Ex-NLRB Chair Rip 'Toothless' Labor Law

Morgan Lewis Law360 09 May 2019 01:08

Already a subscriber? Check out Law360's new podcast, Pro Say, which offers a weekly recap of both he biggest stories and hidden gems from he world of law.

Labor Department, NLRB Funding Increases Get House Panel's OK

BloombergLaw - Labor Relations News 08 May 2019 17:46

• House appropriators approve Labor-HHS bill • Legisla ion advances for full House floor consideration By Tyrone Richardson The House Appropriations Committee approved legislation May 8 that would increase discretionary spending for the Labor Department...

Democratic Bill to Boost Labor Rights Draws Business Opposition

BloombergLaw - Construction Labor News 08 May 2019 16:37

Congress • Bill marks first Democratic pro-union effort in 2019 • Republican bill would curb union rights By Jaclyn Diaz and Tyrone Richardson A wide-reaching labor rights protections bill is just a week old, but it's already racking up vociferous...

NLRB Ex-Chair to Lead Georgetown Law's New Worker Rights Center

Bloomberg Law : Big Law Business 08 May 2019 16:28

Mark Gaston Pearce , former Chairman of the National Labor Relations Board, soon will head to Georgetown University to chair a new Workers' Rights Institute at the college's law school.

No Evidence? No Problem! National Labor Relations Board's General...

National Law Review 08 May 2019 15:52

, the General Counsel of the National Labor Relations Board ("NLRB" or "Board") issued Memorandum GC 19-06 , which provides guidance to he Board's regional offices on how to handle cases involving Beck objectors and how to allocate secondary expenses...

2020 Presidential Hopefuls Make Their Pitch to Machinists Union

BloombergLaw - Labor Relations News 08 May 2019 15:07

• 400 union members attended conference • Speakers included Sanders, Gillibrand, and Booker By Andrew Wallender Democratic presidential contenders told a hotel ballroom full of union members that the party must place workers at the center of its...

Merck Subsidiary Could Deny Holiday to Union Workers: NLRB (1)

BloombergLaw - Daily Labor Report 08 May 2019 13:16

• Merck gave nonunion workers a one-time day off • Bargaining can be tough, but company action was fair, NLRB says By Robert Iafolla A Merck & Co. Inc. subsidiary's move that denied most of its union workers the same one-time paid holiday that the...

New Book: Principled Labor Law

Administrative Law Prof Blog 08 May 2019 11:57

Wednesday, May 8, 2019 By Workplace Prof Share Congratulations to Sergio Gamonal C. (Univ. Adolfo Ibanez - Santiago) and César F. Rosado Marzán (Chicago-Kent) on the publica ion of their book Principled Labor Law: U.S. Labor Law through a Latin American...

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Subject: Legal News FYI 05-10-19
Date: Friday, May 10, 2019 7:14 00 AM
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Friday, May 10, 2019

Trump's Labor Board Has Unions Shelving Complaints

BloombergLaw - Daily Labor Report 10 May 2019 06:07

NLRB • Unfair labor practice charges down 11% since Trump took office • Some unions forego, withdraw cases to avoid pro-business rulings By Andrew Wallender and Hassan A. Kanu Two-plus years into the Trump administration, labor unions are more often...

UAW: Let Volkswagen Organizing Vote Proceed, Get Campaign Going

BloombergLaw - Daily Labor Report 09 May 2019 17:57

By Andrew Wallender The United Auto Workers is initiating a process that would put a campaign to organize Volkswagen 's Chattanooga, Tenn., facility back in motion. The union filed "an action to lift a stay on voting," it announced in a statement May 9....

Women are filing more harassment claims in the #MeToo era. They're also facing more retaliation.

VOX 09 May 2019 15:53

Jen was fired just before Christmas in 2017. She had worked for a music venue for a few months when she learned that David, a musician who she alleges raped friends of hers, was an investor in the company (both of heir names have been changed to protect...

Independent Contractor vs. Employee — The Tug of War Continues

Gray Plant Mooty Law Firm News 09 May 2019 09:31

Two recent developments have occurred in he seemingly constant struggle regarding the classification of independent contractors versus employees. The developments are examples of two very divergent paths that are being taken by various governmental...

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Subject: Legal News FYI 05-13-19
Date: Monday, May 13, 2019 7:12:32 AM
Attachments: image001.png

Monday, May 13, 2019

Workers at 'Soviet-style' Park Slope Food Coop fighting for union

New York Post (New York, NY) 12 May 2019 20:10

It's not all kumbaya and kombucha at the Park Slope Food Coop — where life under its socialist-tinged grocery store is apparently so oppressive that the paid workers are trying to unionize. Employees of the Brooklyn food collective recently alleged...

Lindsey Kelleher, Zachary Herlands

New York Times, The (New York, NY) 12 May 2019 00:00

Lindsey Elisabeth Kelleher and Zachary Eric Herlands were married May 11 at the Hudson Opera House in Hudson, N.Y. Samantha J. Yantko , a friend of he couple who became a Universal Life minister for the event, officiated. Mrs. Herlands , 31, is a human...

Blog Post: Teamsters Want NLRB Member Off Joint-Employer Case

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 10 May 2019 18:04

National Labor Relations Board member William Emanuel shouldn't participate in a case remanded from the D.C. Circuit over the joint-employer test because his former law firm Littler Mendelson PC represents one of the par ies, the Teamsters have told...

California Hospital Must Rewrite Badge, Pin Rules

BloombergLaw - Employment Law News 10 May 2019 16:57

• Nurses kept from wearing union badges • Appeals court affirms NLRB ruling By Porter Wells A California hospital will have to rewrite parts of its employee handbooks to take out restrictions on what buttons and badges its workers can wear to work, the...

Welcome to the Machine(s): Can AI Save Employers From Discrimination or Retaliation Allegations?

JD Supra 10 May 2019 15:33

Employees who claim that they were discriminated against or retaliated against by their employer typically must prove that he employer was substantially motivated by their membership in a protected class (such as race, gender, age, disability) or...

Wind Turbine Maker Settles with NLRB on Union-Busting Charges

BloombergLaw - Daily Labor Report 10 May 2019 09:46

• Company agrees to provide backpay to aggrieved workers • Deal followed NLRB's threat of injunction By Robert Iafolla A wind turbine manufacturer in Texas agreed to pay $135,000 to ten workers who were fired or suspended during a union organizing...

Union Complaints Drop Under Trump Labor Board

BloombergLaw - Daily Labor Report 10 May 2019 07:06

By Patricio Chile More han two years into the Trump administration, labor union filings of unfair labor practice charges to the National Labor Relations Board have fallen by nearly 11 percent. Some unions have withdrawn unionization petitions and even...

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Date: Tuesday, May 14, 2019 8:14:19 AM
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Tuesday, May 14, 2019

Worker Suit Protections Under Threat at Labor Board

BloombergLaw - Daily Labor Report 14 May 2019 07:06

By Patricio Chile Federal labor law protects workers who band together and sue employers to improve their working conditions, but that may change if the National Labor Rela ions Board's top lawyer gets his way. The NLRB general counsel's office argues in...

Labor Law Safeguards for Worker Lawsuits Imperiled at NLRB

BloombergLaw - Employment Law News 14 May 2019 06:46

• Most employment statutes have anti-retaliation protections when workers sue • Case raises questions about the scope of federal labor law By Robert Iafolla Workers could lose a federal labor law's protections against employer retaliation for filing...

New Clarity From NLRB On Successor Bargaining Duties, Law360

Andrews Kurth 13 May 2019 21:11

Lawyer Insights May 1, 2019 New Clarity From NLRB On Successor Bargaining Duties By Amber M. Rogers and Gary Enis Published in Law360 Businesses seeking to grow their opera ions through the acquisition of o her companies often approach potential target...

Steel Mill Defaults on NLRB Pact by Posting Union-Blaming Letter

BloombergLaw - Daily Labor Report 13 May 2019 17:16

• Mill, NLRB reached settlement over an i-union policies • Company's letter undermined negotiated agreement By Porter Wells An Alabama-based steel rolling mill has defaulted on the settlement agreement it reached with the National Labor Relations Board...

Case: Labor Relations/Default Judgment (N.L.R.B.)

BloombergLaw - Labor Relations News 13 May 2019 15:56

The NLRB declines default judgment against a company that allegedly unlawfully denied an employee's request for union representation during a disciplinary interview. Although Section 102.15 of the Board's Rules and Regulations and NLRB precedent make...

Case: Labor Relations/Discrimination (N.L.R.B.)

BloombergLaw - Daily Labor Report 13 May 2019 15:36

In a 2-1 decision, the NLRB finds that Didlake, Inc. lawfully told employees that they would be discharged if a union "prevailed in the election and imposed a union security requirement on the bargaining unit." Although two managers misstated the law...

Nurses at Portland psychiatric hospital take step to unionize

Portland Business Journal (Portland, OR) 13 May 2019 15:04

More than 170 nurses at the Unity Center for Behavioral Health in Portland filed be represented by the Oregon Nurses Association, ONA announced Monday. The nurses filed authorization cards with the National Labor Relations Board calling for a vote. The...

Texas Wind Turbine Manufacturer Settles with Board Over Labor Practices

Insurance Journal (San Diego, CA) 13 May 2019 12:55

A Texas-based wind turbine manufacturer has reached a settlement with federal officials over alleged viola ions of U.S. labor laws. GRI Texas Towers Inc. f/k/a Gestamp Wind Steel US Inc. (GRI), based in Amarillo, entered into a settlement agreement with...

Employer's Unionization Misstatements Didn't Spoil Vote: NLRB (2)

BloombergLaw - Daily Labor Report 13 May 2019 12:07

• Company wrong about consequences of union win • But misstatements weren't inten ional lies, NLRB says By Robert Iafolla The Na ional Labor Relations Board wiped out a union's election victory to represent workers at a Virginia-based employment service...

Obese Worker Bias Protections Weighed in Seventh Circuit

BloombergLaw - Daily Labor Report 13 May 2019 07:06

By Patricio Chile The Seventh Circuit will be the latest court to consider whether obesity should be protected under the Americans wi h Disabilities Act. The case involves a Chicago bus driver who says he was fired because of his obesity. The appeals...

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Subject: Legal News FYI 05-16-19
Date: Thursday, May 16, 2019 7:43:57 AM
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Thursday, May 16, 2019

Labor Exodus Adds to Challenges for Acosta

BloombergLaw - Daily Labor Report 16 May 2019 07:06

By Patricio Chile It's fair to say Labor Secretary Alexander Acosta has had a rough week. The Labor Department's poli ical leadership is losing bodies by the day. That could complicate Acosta's mission to complete key regulations before the end of...

'Stinks to High Heaven': Calls to Investigate Trump Labor Board's Gift to Uber Amid Stock Market Struggles

Common Dreams 15 May 2019 12:27

Uber was in serious need of a lift after a "bleak" and "disappoin ing" stock market debut last week, and President Donald Trump's National Labor Relations Board gave it just that Tuesday by ruling that he company's drivers are independent...

United States: Hunton Employment & Labor Perspective: Media Gag Policies May Violate The NLRA

Mondaq Business Briefing 16 May 2019 06:55

Many workplace policies and employee handbooks contain restrictions on employees speaking to the media. Through hese policies, employers often seek to limit what organizational information is disclosed to hird parties, and to exercise at least some...

Scary Balloons, Downed Dues: NLRB Counsel Scrutinizes Unions

BloombergLaw - Labor Relations News 16 May 2019 06:27

• Advice memos show general counsel's view of labor law • Two memos called for charges against unions By Robert Iafolla and Hassan A. Kanu The Na ional Labor Rela ions Board general counsel's office signaled its intention to continue tightening the...

NLRB Advice Memo May Be Bad News For Fat Cat, Scabby

Corporate Law360 16 May 2019 02:54

By Vin Gurrieri Law360 (May 15, 2019, 7:16 PM EDT) -- Banners and inflatable cat and rat balloons hat unions sometimes use during demonstra ions can qualify as illegal forms of secondary picketing, the National Labor Relations Board general counsel's...

Kickstarter CEO Says Management Won't Voluntarily Recognize Employee Union

Gizmodo (Blog) 15 May 2019 23:35

Recently promoted Kickstarter CEO Aziz Hasan wrote in an email to all staff that company management will not voluntarily recognize a union in the process of organizing and will instead seek a National Labor Rela ions Board election, the Verge reported on...

Uber stock rises after NLRB rules drivers are not employees

New York Post (New York, NY) 15 May 2019 22:05

Uber drivers who are agitating for full-time employee status face a lengthy stretch ahead. Shares of the ride-hailing giant rose 3.3 percent on Wednesday, a day after he National Labor Relations Board ruled that Uber drivers are contractors, not...

Mundo Verde Bilingual Public Charter School Educators Vote to Unionize

American Educator 15 May 2019 21:33

WASHINGTON—Educators at Mundo Verde Bilingual Public Charter School, Washington, D.C.'s first "green" public charter school located in the Truxton Circle neighborhood, voted by a 3-to-1 margin to unionize in a National Labor Relations Board election held...

Silence of the vans: Uber adds 'Plz STFU, driver' button to app for posh passengers using Black

Register, The (Blog) 15 May 2019 19:12

Uber drivers, who have been vocal about low wages and lack of benefits, may soon be less so, at least for those booking its more expensive Uber Black and Uber Black SUV rides. The newly public company, stock buoyed by a US National Labor Rela ions Board...

NLRB could overrule Elon University's objections to union

Times-News (Twin Falls, ID) 15 May 2019 18:07

A National Labor Relations Board hearing officer in Winston-Salem recommended Monday, May 13, that the NLRB Regional Director in Atlanta overrule Elon University's objections to conduct by the Service Employees International Union before and during the...

Seadog organizer who called out Pritzker loses job, claims retaliation

Chicago Sun-Times (Chicago, IL) 15 May 2019 17:41

Less than a week after Gov. J.B. Pritzker's venture capital firm sold Seadog Cruises, a tour guide who made waves when he tried to unionize the company last fall learned he was out of a job. Billy Dean, who worked as a docent the three previous seasons...

Judge Orders New Union Vote at Kumho Tire Plant in Georgia

Morningstar 15 May 2019 16:47

/PRNewswire/ -- An administrative law judge ordered a new union vote at a Kumho Tire factory in Macon, Ga. , after finding that company officials violated workers' rights during the first elec ion in October 2017 . The first vote resulted in a narrow...

Case: Labor Relations/Default Judgment (11th Cir.)

BloombergLaw - Daily Labor Report 15 May 2019 16:47

Outokumpo Stainless USA, LLC defaulted on an agreement settling unfair-labor-practice charges with the NLRB when it posted a "side letter"—which emphasized that it had not been "found guilty" of labor law violations—in advance of posting a s ipulated...

How Volkswagen has gotten away with union-busting

Salon (San Francisco, CA) 15 May 2019 15:43

Labor law is not workers' law. That's the lesson learned by pro-union workers at Volkswagen's sole U.S. factory in Chattanooga, Tennessee. Workers filed for an election to join the United Auto Workers (UAW) in early April. This would have been the third...

Volkswagen: Union Election Filing Was Unlawful and Must Wait

BloombergLaw - Daily Labor Report 15 May 2019 13:37

• Prior election should have prevented new vote, VW says • UAW withdrew representation from prior vote last mon h By Andrew Wallender A United Auto Workers bid to represent employees at Volkswagen's Chattanooga, Tenn., facility should remain on hold for...

Ithaca Coffee Company staff file NLRB complaint

Tompkins Weekly (Ithaca, NY) 15 May 2019 13:21

By Last month, on April 17, a collection of no-managerial workers at Ithaca Coffee Company (ICC) informed ICC owner Julie Crowley their intent to form a union. Since then, workers are claiming that management has engaged in unlawful labor violations to...

Greyhound workers' heated argument was protected activity

HR Dive 15 May 2019 13:15

Dive Brief: Greyhound Lines, Inc. violated the National Labor Relations Act's (NLRA) when it fired a long-time employee after a confrontation with a manager, a three-member panel of the National Labor Relations Board (NLRB) has ruled (Greyhound Lines,...

NLRB LIBRARY Your Primary Source

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Date: Friday, May 17, 2019 8:22 07 AM
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Friday, May 17, 2019

Employer's Campaign Prediction That Employees Would Have To Join...

National Law Review 16 May 2019 19:25

The NLRB currently is churning out cases and Advice Memoranda at a fairly regular pace. We recently discussed NLRB decisions addressing information requests , handbook statements, and confidential informants . An interesting area of NLRB case law...

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

BloombergLaw - Daily Labor Report 16 May 2019 15:46

A company that operates the Palms Casino Resort in Las Vegas unlawfully refused to recognize and bargain with a union hat the NLRB certified as the exclusive representative of a unit of its servers, bartenders, porters, and other employees. All...

Fired Seadog labor organizer claims retaliation

Daily Herald (Arlington Heights, IL) 16 May 2019 13:54

Less than a week after Gov. J.B. Pritzker's venture capital firm sold Seadog Cruises, a tour guide who made waves when he tried to unionize he company last fall learned he was out of a job. Billy Dean, who worked as a docent the three previous seasons...

Labor Commissioner Reaffirms Position on Worker Classification in Response to NLRB Advice Memorandum

New Jersey Department of Labor and Workforce Development 16 May 2019 13:34

In response to the Advice Memorandum (Dated April 16th) released by the National Labor Relations Board, today the New Jersey Labor Commissioner has issued the following statement: "This Advice Memorandum has zero effect on how the New Jersey Department...

Washington governor wants to save planet and unions, at the same time

Washington Post (Washington, DC) 16 May 2019 13:16

Washington Gov. Jay Inslee , D, just unveiled what he calls the Evergreen Economy Plan, a blueprint for significant new investments in infrastructure, clean technology, and green jobs. He would spend $300 billion a year in federal funds building a green...

Case: Labor Relations/First Amendment (N.D. Ill.)

BloombergLaw - Daily Labor Report 16 May 2019 12:46

A federal district court won't order the NLRB, a regional director, and General Counsel Peter B. Robb to stop preventing an Opera ing Engineers union from using inflatable rats and banners to communicate its labor dispute with a construc ion and...

Employees' Dues Checkoff Authorization for Predecessor Union Not Effective for Successor Union Absent Successors and Assigns Language: NLRB Division of Advice

Thomson Reuters Practical Law : Labor & Employment 16 May 2019 00:00

On May 14, 2019, the Office of the General Counsel of the National Labor Relations Board (NLRB) released an advice memorandum concluding hat an employer lawfully refused to deduct and remit dues to a successor union after the original local union's...

NLRB Division of Advice Concludes That Uber Drivers Are Not Employees Under the NLRA

Thomson Reuters Practical Law : Labor & Employment 16 May 2019 00:00

On May 14, 2019, the Office of the General Counsel of the National Labor Relations Board (NLRB) released an advice memorandum concluding hat Uber drivers are independent contractors and not Uber employees.

NLRB Division of Advice Pans Overbroad Solicitation Rule and Conflicts of Interest Policy, Parses Unlawful Email System Use Ban from Lawful Ban on Use of Other Equipment and Supplies, and Upholds Coaching Despite Overbroad Rule

Thomson Reuters Practical Law : Labor & Employment 16 May 2019 00:00

On May 14, 2019, the Office of the General Counsel of the National Labor Rela ions Board (NLRB) released an advice memorandum considering the lawfulness of employer policies prohibiting insubordina ion, solicitation and distribution of literature,...

NLRB LIBRARY Your Primary Source

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From: Martin, Andrew
Subject: Legal News FYI 05-20-19
Date: Monday, May 20, 2019 7:51:09 AM
Attachments: image001.png

Monday, May 20, 2019

Is the gig economy a path to prosperity or the indenture of just getting by?

Salon (San Francisco, CA) 19 May 2019 08:03

One of he best things that American capitalism has going for it is the myth machine that's programmed generations of school age Americans to believe that our collec ive national story is a narra ive of remarkable broad-based socio-economic progress....

Union protests at Waikiki hotels center around timeshare issues

Honolulu Star-Advertiser (Honolulu, HI) 18 May 2019 02:42

CINDY ELLEN RUSSELL / CRUSSELL@STARADVERTISER.COM Hundreds of workers gathered at he Hilton Hawaiian Village Waikiki Beach Resort, where members recently passed a vote saying they are willing to authorize a strike if negotiations do not improve. Unite...

UAW trying to organize Volkswagen Chattanooga plant amid battle of new election for union

Chattanooga Times/Free Press (Chattanooga, TN) 17 May 2019 22:34

When the United Auto Workers first tried to unionize production workers at Volkswagen's assembly plant in Chattanooga more than five years ago, the company filed the request to the National Labor Relations Board after the union collected enough petition...

NLRB General Counsel Advice Memorandum Is "Uber" Favorable For Gig Economy Companies Utilizing Independent Contractors (US)

National Law Review 17 May 2019 19:18

, the National Labor Relations Board's ("NLRB") Office of the General Counsel ("GC") determined that drivers utilizing Uber Technologies' smartphone application-based rideshare platform are independent contractors, not employees, under the National Labor...

Employer's Campaign Prediction That Employees Would Have To Join Union And Pay Dues As Condition Of Employment Not Coercive, NLRB Majority Rules

JD Supra 17 May 2019 17:19

The NLRB curren ly is churning out cases and Advice Memoranda at a fairly regular pace. We recen ly discussed NLRB decisions addressing information requests, handbook statements, and confidential informants. An interesting area of NLRB case law concerns...

Case: Labor Relations/Certification of Representative (N.L.R.B.)

BloombergLaw - Daily Labor Report 17 May 2019 16:37

An employer hat owns the Palace Sta ion Hotel & Casino in Las Vegas unlawfully refused to recognize and bargain with a union that the NLRB cer ified as the representa ive of its slot and utility technicians. The employer contested the validity of the...

Judge punctures Local 150 union's try to sue NLRB for moving to limit 150's use of inflatable rats to protest

Cook County Record (Chicago, IL) 17 May 2019 14:58

A federal judge has deflated a legal action accusing the National Labor Relations Board of violating a union's rights to free speech by moving to stop the union from using inflatable rats and banners to continuosly protest "rat contractors." Read more..

Labor Board Upholds Employers' Right To Provide Truthful Information About Right To Work Laws

JD Supra: Labor & Employment Law 17 May 2019 13:22

The Na ional Labor Rela ions Board (NLRB) has dismissed a complaint against a Wisconsin employer that published a document informing employees of their right to stop paying union dues under Wisconsin's right to work law. Metalcraft of Mayville, 367.....

Labor Unions and Countervailing Power

Mother Jones 17 May 2019 13:18

Shor ly after World War II ended, John Kenneth Galbrai h coined the phrase "countervailing powers." Here is Ezra Klein: You rarely hear the term today, but it's time to bring it back. It's key to understanding the debate playing out in the Democratic...

NLRB Releases Advice Memos On Gig Workers, Inflatable Critters, And More

JD Supra: Labor & Employment Law 17 May 2019 12:49

With maybe some relief for employers. This week, the General Counsel of the National Labor Relations Board publicly released some advice memoranda that indicate better times for employers and possibly tougher times for unions and workers in the gig.....

Dealing With A Divided Workforce: NLRB Clarifies Standard For Treating Union And Nonunion Workers Differently

JD Supra: Labor & Employment Law 17 May 2019 12:08

Under the National Labor Relations Act (NLRA), groups of employees are allowed to determine whether they wish to be represented by a union for purposes of collective bargaining, which sometimes results in businesses having both union and nonunion... By:...

Using a Cat to Chase the Inflatable Rat: NLRB General Counsel Urged...

National Law Review 17 May 2019 10:12

Continuing its efforts to overturn precedent, the NLRB General Counsel's Division of Advice has issued a new advice memorandum looking to strike at the most recognizable sign of unionism in urban areas today – – the inflatable rat that is used to signal...

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From: Martin, Andrew
Subject: Legal News FYI 05-22-19
Date: Wednesday, May 22, 2019 8:18:38 AM
Attachments: image001.png

Wednesday, May 22, 2019

NLRB Moves Quietly to Reverse Pro-Worker Arbitration Rule

BloombergLaw - Daily Labor Report 22 May 2019 06:27

Labor Law • NLRB seeks to reconsider arbitration precedent without notice • Move has greater import given recent SCOTUS arbitration rulings By Hassan A. Kanu The National Labor Rela ions Board has been working to make it easier for employers to steer...

In a Test of Their Power, #MeToo's Legal Forces Take On McDonald's

New York Times, The (New York, NY) 22 May 2019 01:21

In 2016, when she was 16, Brittany Hoyos started her first job, at a busy McDonald's in Tucson . Not long after, she said, a manager began harassing her, touching her hair, texting her about her appearance and once making a move to kiss her after...

The DOL and NLRB Agree: Gig Economy Workers Are Contractors, Not Employees

JD Supra 21 May 2019 17:10

According to recent guidance issued by the DOL and NLRB, workers in the so-called "gig," on-demand," or "sharing" economy are independent contractors, not employees. This represents a significant departure from Obama-era policy and is expected to have...

3 senators question delay on Volkswagen Tennessee union vote

Associated Press News (AP) 21 May 2019 16:35

CHATTANOOGA, Tenn. (AP) — Three Democratic U.S. senators are expressing concerns about delays to an election over whether Volkswagen maintenance and production workers in Tennessee should unionize. Sens. Sherrod Brown of Ohio and Gary Peters and Debbie...

What McDonald's Workers Really Need to Fight Sexual Harassment is a Union

Jezebel (United States) 21 May 2019 16:06

Image: Getty Last September, McDonald's workers in cities around the country walked off the job to protest the company's failure to take action to curb endemic sexual harassment in the workplace. Jamelia Fairley, who began working at a McDonald's in...

McDonald's Workers Bring New Harassment Claims (2)

BloombergLaw - Daily Labor Report 21 May 2019 11:26

• 20 new EEOC charges, 5 new lawsuits filed • Protests planned for May 21 and 23 ahead of shareholder meeting By Paige Smith McDonald's workers filed five new workplace sexual harassment lawsuits and 20 new harassment charges with the Equal Employment...

Senators Probe Volkswagen Conduct in Wake of Union Campaign (1)

BloombergLaw - Labor Relations News 21 May 2019 10:06

• Senators have "deep concern" over he company's conduct • Volkswagen has seven days to respond By Andrew Wallender Three U.S. senators are demanding answers from Volkswagen after the company pushed the federal labor board to delay a union election at...

Michael Hiltzik: Black unemployment is rising again, undermining a Trump boast on economic growth

Los Angeles Times (Los Angeles, CA) 21 May 2019 09:31

May 21-- May 21 --One aspect of American life that President Trump never tires of taking credit for is economic growth -- specifically, job growth. So you won't hear him pointing out the disturbing discrepancy in the employment figures between white and...

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Subject: Legal News FYI 05-23-19
Date: Thursday, May 23, 2019 7:25:41 AM
Attachments: image001.png

Thursday, May 23, 2019

NLRB Targets Grad Student Unions In New Reg Agenda

Bryan Cave Law360 23 May 2019 03:40

By Vin Gurrieri Law360 (May 22, 2019, 11:19 PM EDT) -- The National Labor Relations Board is planning to unveil regulations that clarify whether graduate student assistants at private universities can unionize and the U.S. Department of Labor will seek...

Anheuser-Busch's Bid to Arbitrate Lawsuit Allowed, NLRB Says

BloombergLaw - Daily Labor Report 23 May 2019 06:56

• Company has First Amendment right to peti ion court • Motion to compel arbitration didn't have illegal aims By Robert Iafolla Anheuser-Busch can try to push a former union employee's racial discrimination lawsuit into private arbitration even though...

Legal battle opens possibility for rehiring radio hosts

Watertown Daily Times (Watertown, NY) 23 May 2019 01:06

WATERTOWN — Local radio hosts contending that the owner of Classic Hits Z93 and Froggy 97 wrongfully terminated their employment may get their jobs back when the matter is taken to court. The National Labor Relations Board found Stephens Media Group had...

DC charter school educators vote to unionize

Amsterdam News (New York, NY) 23 May 2019 00:02

Educators at a bilingual charter in the nation's capital voted to unionize. Educators at the Mundo Verde Bilingual Public Charter School in Washington, D.C., the first "green" public charter school, voted by a 3-to-1 margin to unionize in a National...

NLRB Says Guard's Heated Chat Cost Her Labor Law Defense

Greenberg Traurig Law360 22 May 2019 21:24

By Adam Lidgett Law360 (May 22, 2019, 6:49 PM EDT) -- The National Labor Relations Board has agreed with an administrative law judge's finding that an Entergy Nuclear Operations Inc. security guard wasn't wrongly disciplined when she was given a verbal...

NLRB In 7-Page Ruling Affirms Blocking Of UAW Vote At Chattanooga VW Plant; UAW Files For New Election

Chattanoogan (Chattanooga, TN) 22 May 2019 20:30

A majority of the National Labor Relations Board has put down a seven-page ruling dismissing a pe ition by the United Auto Workers union for a general membership election at the Chattanooga Volkswagen plant. The ruling says the UAW earlier was certified...

Boeing Questioned on Union by Over 70 Members of Congress

BloombergLaw - Labor Relations News 22 May 2019 18:17

• Boeing asked to provide rationale on worker firings • Members of Congress urge union recognition By Andrew Wallender More than 70 U.S. representatives are demanding information from top Boeing Co. executive Dennis Muilenburg on the company's reluctance...

Blog Post: Union Launches New VW Election Push After NLRB Loss

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 22 May 2019 17:58

The United Auto Workers asked the National Labor Rela ions Board again Wednesday to let workers at Volkswagen's Tennessee plant vote to organize, hours after a split NLRB panel rejected an election petition the union filed last month. ...read more

National labor board orders Palms to negotiate with union

Las Vegas Review-Journal (Las Vegas, NV) 22 May 2019 16:43

Damien Hirst's The Unknown, Explored, Explained, Exploded, shark art piece inside the renovated Palms hotel-casino in Las Vegas, Thursday, May 17, 2018. Erik Verduzco Las Vegas Review-Journal @Erik_Verduzco The National Labor Relations Board issued a...

Volkswagen Union Petition Refiled Following Labor Board Setback

BloombergLaw - Labor Relations News 22 May 2019 16:16

By Andrew Wallender A representation vote on whether to unionize is back on track at Volkswagen 's facility in Chattanooga, Tenn., after the United Auto Workers filed new paperwork for an election. The move comes mere hours after the federal labor board...

Case: Labor Relations/Discrimination (D.C. Cir.)

BloombergLaw - Daily Labor Report 22 May 2019 16:06

The NLRB properly found that Sparks Restaurant unlawfully discharged and failed to reinstate striking waiters and bartenders following heir voluntary and unconditional offer to return to work. Sparks argued that its decline in business after December...

Labor Board Plans Rules on Worker Protests, Student Organizing (1)

BloombergLaw - Construction Labor News 22 May 2019 13:37

Labor Law • Short-term agenda includes regulations on student organizing, worker protests • Joint employer effort remains on long-term to-do list By Hassan A. Kanu and Robert Iafolla The National Labor Relations Board plans major new rulemakings in 2019...

Volkswagen Union Bid Tossed Out by Labor Board (2)

BloombergLaw - Daily Labor Report 22 May 2019 11:57

• NLRB said union had no grounds to file for election • UAW will need to refile its petition, restart the process By Andrew Wallender A pe ition to unionize Volkswagen's 1,700 workers in Chattanooga, Tenn., must be dismissed, the National Labor Relations...

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Date: Tuesday, May 28, 2019 7:20:17 AM
Attachments: image001.png

Tuesday, May 28, 2019

Nobody Wins If Graduate Students Can't Organize

Chronicle of Higher Education (Washington, DC) 27 May 2019 20:25

Michael Alexander Gould-Wartofsky New York U. graduate-student workers and their allies protested for a fair contract in November 2014. The National Labor Relations Board announced last week that it plans to propose a rule his fall that will establish...

'Because we know that strikes work': College unions leverage publicity in tough contract battles

Chicago Tribune (Chicago, IL) 27 May 2019 07:11

Students rally to support graduate and teaching assistants on strike at University of Illinois at Chicago on April 5, 2019. A recurring scene played out at local college campuses this year: picket lines. Workers at the University of Illinois at Chicago,...

United States: Is An Employee Handbook Confidential? NLRB Says No

Mondaq Business Briefing 27 May 2019 03:01

Many employers have rules stating that heir employee handbooks and the policies contained within them are confidential. A recent National Labor Relations Board ("NLRB") advisory guidance memo says that such a rule runs afoul of the National Labor...

The public flare-up of union organizing at Delta Air Lines has its roots in Northwest

Minneapolis Star Tribune (Minneapolis, MN) 25 May 2019 09:23

Family feuds die hard and a perennial one over unions at Delta Air Lines is getting a new and highly visible airing. An organizing effort by the airline's ramp workers and flight attendants took a turn in the spotlight of viral social media earlier his...

Blog Post: Browning-Ferris Doesn't Want NLRB Member Booted From Case

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 24 May 2019 17:12

National Labor Relations Board member William Emanuel should be allowed to weigh in on the board's joint-employer test in a case on remand from the D.C. Circuit, Browning-Ferris argued, since it wasn't clear his former law firm represented a party...

Case: Labor Relations/Discrimination (N.L.R.B.)

BloombergLaw - Labor Relations News 24 May 2019 16:16

The operator of the Pilgrim Nuclear Power Station in Plymouth, Massachusetts lawfully fired a security officer and union steward who raised her voice and used profanity in an incident with a co-worker that began in a restroom. Although the officer...

NLRB's Rulemaking Push May Test Agency's Regulatory Chops

BloombergLaw - Construction Labor News 24 May 2019 15:56

• NLRB tradition: deciding cases over developing rules • No new staffers yet to help with regulations By Robert Iafolla The National Labor Relations Board's ambitious slate of regulatory plans likely will test the agency's rulemaking capacity, depending...

Tech Worker Illegally Fired for Discussing Exec's Pay: NLRB

BloombergLaw - Labor Relations News 24 May 2019 14:46

• NLRB reaffirms Obama-era decision • Finds employer's reason pretextual By Robert Iafolla An Ohio-based technology company violated federal labor law by firing an engineer because he criticized an execu ive's $400,000 salary during a team-building...

Supreme Court Dims The Light On Class Arbitration

Mondaq Business Briefing 24 May 2019 06:07

By a 5-to-4 vote, the Supreme Court ruled today that the Federal Arbitration Act does not allow a court to compel class arbitration when the agreement does not clearly provide for it. As a result, employers whose valid arbitration agreements do not...

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From: Martin, Andrew
Subject: Legal News FYI 05-30-19
Date: Thursday, May 30, 2019 7:39:17 AM
Attachments: image001.png

Thursday, May 30, 2019

Worker Center Battle Could Get Labor Board Scrutiny

BloombergLaw - Daily Labor Report 30 May 2019 07:06

By Patricio Chile The nation's largest business lobby, he U.S. Chamber of Commerce, has been asking he Labor Department for years to hold worker centers to the same federal requirements as labor unions. Now the Chamber is seeking a new ally, the...

In Worker Center Battle, Business Seeks New Government Ally

BloombergLaw - Daily Labor Report 30 May 2019 06:27

• First time Chamber has directly called for NLRB action • 'Labor organization' determination would limit protest actions By Andrew Wallender The country's largest business lobby is turning to he National Labor Relations Board as a poten ial new ally in...

Case: Labor Relations/Discrimination (D.C. Cir.)

BloombergLaw - Daily Labor Report 29 May 2019 17:06

The NLRB properly found that Tito Contractors, Inc. unlawfully fired five employees in response to union and other protected activities. Tito argued that it would have fired the employees in any event because of misconduct or low productivity, but the...

Case: Labor Relations/Arbitration (W.D. Ark.)

BloombergLaw - Labor Relations News 29 May 2019 16:27

An arbitrator properly found that Exide Technologies violated a labor contract when it unilaterally contracted with Unum to administrate Family and Medical Leave Act leave. Exide argued that he arbitrator ignored a contract provision entitled...

Labor Board Restructuring Plan Includes Nationwide Demotions

BloombergLaw - Daily Labor Report 29 May 2019 16:27

NLRB • Plan will promote some admin staff, demote others • Agency union moves to challenge planned ac ion By Hassan A. Kanu The heads of the National Labor Relations Board are planning a restructure of administra ive staff at the agency's roughly 26...

Blog Post: NLRB Judge Clears 'Scabby' But Extermination Still Possible

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 29 May 2019 14:13

The Na ional Labor Rela ions Board may soon have a chance to shoo Scabby the Rat after an agency judge teed up the question of the critter's legality by ruling that a union didn't violate federal labor law by deploying the well-known labor protest...

Volkswagen Union Election Scheduled for June 12-14

BloombergLaw - Daily Labor Report 29 May 2019 13:16

By Andrew Wallender Employees at Volkswagen 's Chattanooga, Tenn., production facility will cast their votes on whether to unionize in a three-day election set for June 12-14. The announcement comes after the United Auto Workers refiled for a union...

Blog Post: Electric Co. Can't Sidestep Union Contract, 3rd Circ. Says

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 29 May 2019 13:05

The National Labor Relations Board correctly held that an electrical contractor was tardy in withdrawing from a multiemployer collec ive bargaining association and illegally refused to honor a collective bargaining agreement the association subsequently...

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From: Martin, Andrew
Subject: Legal News FYI 05-31-19
Date: Friday, May 31, 2019 7:25 55 AM
Attachments: image001.png

Friday, May 31, 2019

The Union Strikes Back: Work Stoppages Of The Future

Mondaq Business Briefing 31 May 2019 04:28

In 2018, strikes appeared to be everywhere: from fast food restaurants to Google, statehouses to schoolhouses. After decades of declining strike activity, workers took to the streets on a magnitude not seen in recent memory. Workers in the public and...

Employer's Campaign Prediction That Employees Would Have To Join Union And Pay Dues As Condition Of Employment Not Coercive, NLRB Majority Rules

Mondaq Business Briefing 31 May 2019 00:13

The NLRB curren ly is churning out cases and Advice Memoranda at a fairly regular pace. We recen ly discussed NLRB decisions addressing information requests , handbook statements, and confidential informants . An interesting area of NLRB case law...

SEIU Bargained in Bad Faith, Employee Union Alleges

BloombergLaw - Labor Relations News 30 May 2019 18:07

• Complaint says SEIU not sharing needed information • SEIU reached pact with pension fund employees By Louis C. LaBrecque The union that represents Service Employees Interna ional Union employees says the SEIU is failing to bargain in good faith. Local...

Case: Labor Relations/Interference (N.L.R.B.)

BloombergLaw - Daily Labor Report 30 May 2019 15:46

Quality Dining, Inc. didn't violate federal labor law by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related...

VW Tennessee Workers Get Another Chance for Unionization

The Detroit Bureau (Detroit, MI) 30 May 2019 10:09

The UAW's third election in five years at VW's Chattanooga plant will take place in mid-June. The UAW is getting its another kick at the can when Volkswagen of America hourly workers in Tennessee will vote yet again to decide if they want to be...

Tennessee Gov. Bill Lee's Office Is Working With Volkswagen to Crush a Union Drive

The Intercept 30 May 2019 08:35

Tennessee Gov. Bill Lee's office has been secretly assisting Volkswagen's efforts to defeat the United Auto Workers organizing drive in Chattanooga, according to emails obtained through the state's public records law. At least three of Lee's policy...

Hunton Employment & Labor Perspectives: Employer's Posting Of Side Letter Explaining NLRB Settlement Notice Breaches Settlement Agreement

Mondaq Business Briefing 30 May 2019 04:06

On May 13, 2019 , in Outokumpo Stainless USA, LLC v. N.L.R.B. , No. 17-15498 (11th Cir.), the Court of Appeals for he Eleventh Circuit enforced an NLRB order finding that stainless steel producer Outokumpo's posting of a side letter along with a NLRB...

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Subject: Legal News FYI 05-34-19
Date: Friday, May 24, 2019 8:11 04 AM
Attachments: image001.png

Friday, May 24, 2019

Can Student-Workers Unionize? NLRB to Issue New Rules on the Question

Lexology 24 May 2019 07:09

In a significant development for private colleges and universities, the National Labor Rela ions Board (NLRB) that would establish a “standard for determining whether students who perform services at private colleges or universities in connection with...

Walmart Faces Multiple Bias Cases as Plaintiffs Shift Strategy

BloombergLaw - Daily Labor Report 24 May 2019 07:06

By Patricio Chile The Daily Labor Report First Move will not publish Monday in observance of Memorial Day. We will resume on Tuesday, May 28. Walmart has seen its fair share of pay bias lawsuits over the years, but plaintiffs are again changing their...

Telling Worker 'Shut Up' Not Anti-Union Animus, NLRB Says

Corporate Law360 24 May 2019 06:08

Law360 (May 23, 2019, 6:52 PM EDT) -- Electrolux Home Products didn't violate federal labor law when it fired a worker managers told to "shut up" during a captive-audience meeting, the NLRB ruled, concluding hat while that treatment may have been rude,...

An Epic Timeline: The Cases That Set The Stage

Morgan Lewis Law360 24 May 2019 00:08

Law360 (May 23, 2019, 10:51 PM EDT) -- The Epic Systems case may have captivated U.S. Supreme Court watchers in 2018, but the seeds that led to last May's blockbuster decision were sewn by he California Supreme Court and the National Labor Relations...

NLRB to revisit ruling that gave grad students right to organize as employees

Washington Post (Washington, DC) 23 May 2019 18:53

WASHINGTON - The National Labor Relations Board is set to revisit a 2016 ruling that granted teaching and research assistants at private universities legal protection to form unions, a move that could disrupt collec ive bargaining at some of the nation's...

Case: Labor Relations/Representation (N.L.R.B.)

BloombergLaw - Daily Labor Report 23 May 2019 17:46

In a 2-1 decision, the NLRB applies its certification bar doctrine to bar a representation election in a unit of production and maintenance employees for an auto manufacturer that contested the board’s certification of a different unit of only its...

Station Casinos Ordered to Bargain with Palms Workers as Company Appeals NLRB Ruling

Casino.org 23 May 2019 17:30

The running dispute between Station Casinos and the Culinary Workers Union (CWU) continues as the National Labor Relations Board (NLRB) has again ordered the company to bargain with gaming venue employees — this time at the Palms Casino Resort. Sta ion...

Blog Post: Electrolux Didn't Fire Worker Over Union Views, NLRB Says

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 23 May 2019 14:51

The Na ional Labor Rela ions Board has ruled that Electrolux Home Products didn't use a worker's insubordination as a smokescreen for firing her over her pro-union efforts, saying her boss' request that she "shut up" during an anti ...read more

Blog Post: Split NLRB OKs Anheuser-Busch Bid To Arbitrate Race Claim

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 23 May 2019 12:40

The Na ional Labor Rela ions Board has ruled 2-1 that Anheuser-Busch LLC can try to force a Teamster-represented former worker's race discrimination claim into arbitration, even though the company's arbitra ion agreement doesn't cover union ...read more

NLRB to propose property rule in September

HR Dive 23 May 2019 09:07

Dive Brief: The National Labor Relations Board (NLRB) will soon propose regulations establishing standards under the National Labor Relations Act (NLRA) for worker and union access to an employer's private property, it announced Wednesday. In its spring...

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Martin, Andrew
Subject: Legal News FYI 025-29-19
Date: Wednesday, May 29, 2019 8:13:44 AM
Attachments: image001.png

Wednesday, May 29, 2019

Mulvaney Tightens Grip on Labor Chief After Trump Allies Grumble

By Ben Penn

President Donald Trump's acting chief of staff, Mick Mulvaney, has seized power over the Labor Department's rulemaking process out of frustration with the pace of deregulation under Labor Secretary Alexander Acosta, according to current and former department officials and other people who communicate with the administration.

Union Lawyer Stays Aggressive Despite Rightward Trend

BloombergLaw - Daily Labor Report 29 May 2019 07:06

By Patricio Chile Many unions have stayed away from the federal courts and the Na ional Labor Relations Board as they've grown more conservative with the influx of Trump administration appointees. But under the stewardship of General Counsel Dale...

Chicago Union's Lawyer Willing to Lose on the Way to Victory

BloombergLaw - Construction Labor News 29 May 2019 06:17

• General Counsel Dale Pierson directs Engineers Local 150's aggressive strategy • Former mayoral candidate navigates union poli ics By Robert Iafolla When Chicago-area municipalities moved to endorse a broad set of reforms promoted by Illinois'...

NY Farmworkers Win Collective Bargaining Rights – Will Other States Follow Suit?

JD Supra Law News 28 May 2019 19:11

In a groundbreaking decision, a New York state appeals panel just extended union organizing rights to farmworkers, perhaps setting the stage for other states to do the same. While farmworkers have traditionally been exempted from the National Labor...

Case: Labor Relations/Attorney Misconduct (N.L.R.B.)

BloombergLaw - Daily Labor Report 28 May 2019 17:36

An attorney's alleged misconduct before the NLRB is referred to the board's Investigating Officer for investigation and such disciplinary action as may be appropriate. An administrative law judge granted the general counsel's motion to strike six...

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

BloombergLaw - Daily Labor Report 28 May 2019 16:27

Anheuser-Busch, LLC lawfully sought to compel arbitration of the race discrimination and retaliation claims of a discharged employee who had been covered by a labor contract. Although this was the first time the employer suggested that its arbitration...

An Epic Timeline: The Cases That Set the Stage, Law360

Morgan Lewis News 28 May 2019 16:15

Morgan Lewispartner Harry Johnson was interviewed by Law360 about his work on the National Labor Relations Board that helped lay the groundwork for the 2018 Supreme Court decision in Epic Systems Corp. v. Lewis , which upheld the legality of class action...

NLRB Shows Its Hand: Shift Toward Employer-Friendly Standards to Continue

National Law Review 28 May 2019 13:41

Article By The Na ional Labor Relations Board (NLRB) last week announced its rulemaking priorities for the coming year in its Spring 2019 regulatory agenda. The proposed rules, announced May 22, foreshadow the Trump Board's continuing shift to create...

Arbitration Provision Keeps Sheet Metal Firm at Bargaining Table

BloombergLaw - Construction Labor News 28 May 2019 12:36

• Unilateral right to repudiate not absolute • Employer, union must bargain for new contract By Porter Wells An Oregon company didn't have the right to renounce a collective bargaining agreement with a sheet metal worker's union, the Ninth Circuit ruled....

EEOC's Dhillon Takes Reins, Offers Few Clues

BloombergLaw - Daily Labor Report 28 May 2019 07:06

By Patricio Chile The EEOC has walked a pretty steady line on contentious issues like workplace protections for LGBT individuals and approaches to closing the gender pay gap. The course ahead remains unclear with a new leader at the helm. Victoria...

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: POLITICO"s Morning Shift
To: Ring, John
Subject: New rules at the NLRB — 2020 candidates join the picket line — H-1B registration fee
Date: Thursday, May 23, 2019 10:03:28 AM

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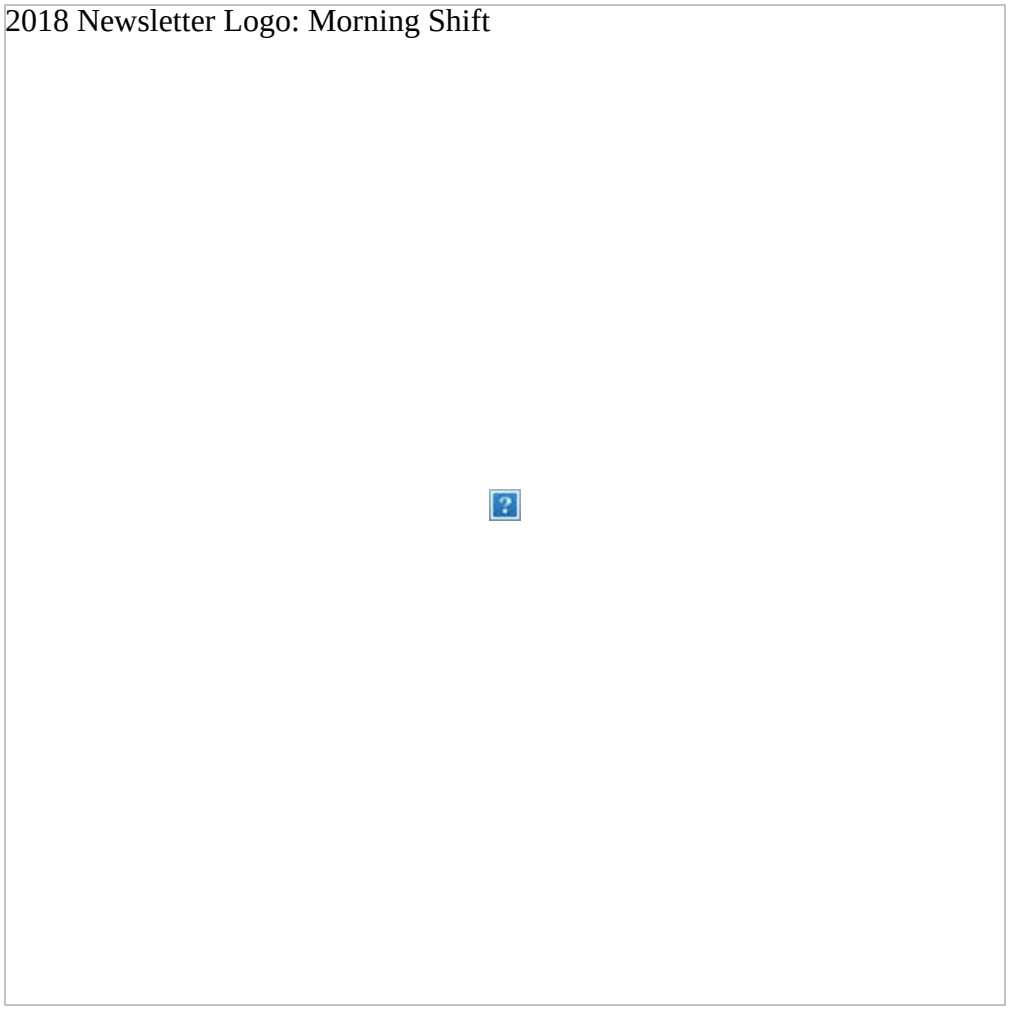

BY **REBECCA RAINEY**

With help from Alice Miranda Ollstein and Tim Noah

PROGRAMMING NOTE: *Morning Shift will not publish on Monday May 27. Our next Morning Shift newsletter will publish on Tuesday May 28. Please continue to follow PRO Employment and Immigration issues here.*

Editor's Note: This edition of Morning Shift is published weekd ays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about

POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here< /a>.

QUICK FIX

— The NLRB is preparing a proposed rule that will likely reverse its 2015 *Columbia* decision allowing unions for grad-student research and teaching assistants.

— Presidential candidates will join McDonald's workers today as they picket the fast-food giant to demand a $15 hourly wage and the right to join a union.

— USCIS will propose charging employers a fee to participate in its new H-1B registration process.

GOOD MORNING! It's Thursday, May 23, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

NEW RULES FROM NLRB: The spring regulatory agenda released Wednesday by the Office of Management and Budget signaled that the Trump NLRB will continue its strategy (begun in September with its proposed rule on joint employment) of overturning Obama-era precedents through rulemaking, POLITICO's Rebecca Rainey reports.

According to the regulatory agenda, the agency will issue by September a proposal "to establish the standard for determining whether students who perform services at a private college or university in connection with their studies are 'employees,'" and may therefore unionize. Since the board's ruling in its 2016 *Columbia* decision already established that these students (mostly grad students) may indeed unionize, the apparent purpose of the rulemaking is to overturn *Columbia*. (The *Columbia* decision reversed a 2004 NLRB ruling in *Brown* that student workers may not unionize.)

The re gulatory agenda also said that the NLRB will issue by September a proposed rule to establish standards for union access to an employer's private property. That rulemaking appears intended to r everse a 2010 NLRB decision that a supermarket violated federal labor law in excluding a union from distributing handbills on its property even as it granted similar access to other groups. The NLRB's new strategy of substituting regulations for legal decisions is "an attempt by the Trump board to try and resolve the issue once and for all. It's much harder to undo a rulemaking," Steven Suflas, a management side attorney at the firm Ballard Spahr told Morning Shift. "The issue of whether grad students are students or employees has been an absolute ping pong ball at the NLRB, and every time there's been a change in the [political] makeup there's been a change in the substantive law on the issue," he said. More from POLITICO here.

UNIONS

VW UNION DRIVE LIVES ANOTHER DAY: The United Automobile Workers swiftly re-filed for a union election at Volkswagen's Chattanooga plant Wednesday afternoon, just hours after the NLRB ordered a regional director to reject an earlier petition on procedural grounds, POLITICO's Ian Kullgren reports.

The board's Republican majority said the petition for a plant-wide union vote may not be considered because it conflicted with a still-pending previous UAW effort to organize only maintenance workers at the plant. However, the NLRB also said the union may seek a new election — one that would cover virtually all employees at the plant — by starting the process over again, Kullgren reports. If approved, it would be the Chattanooga plant's third vote in five years on whether to unionize. More from Kullgren here.

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2020 WATCH

PICKETING PRESIDENTIAL HOPEFULS: Presidential contenders Bernie Sanders, Cory Booker , Julián Castro, and Jay Inslee will join striking McDonald's workers today as they picket for a $15 minimum wage and the right to join a union. The SEIU-backed Fight for $15, which organized the effort, filed 25 sexual harassment complaints Tuesday against franchised and corporate-owned McDonald's restaurants, with support from the Time's Up Legal Defense Fund. Fight for $15, ahead of today's annual McDonald's shareholder meeting in Dallas, purchased ads that will wrap and also be placed inside that region's USA Today newspapers. Find the ad here.

Related: "McDonald's Workers Want OSHA to Investigate Pattern of Violence," from Bloomberg

REGULATORY CORNER

WAITING FOR DOL: OMB'S regulatory roadmap didn't have a lot to say about the timetable for major regulations at the Labor Department. No dates were provided on when we'll see further action on overtime eligibility, joint employment under the Fair Labor Standards Act, or the department's industry-led apprenticeship program. But we did learn that the Office of Federal Contract Compliance Programs plans to issue by September a proposed rule concerning nondiscrimination and affirmative action requirements for federal contractors. The OFCCP proposal would "codify certain procedures and documents OFCCP uses to resolve potential violations of these laws."

That sounds like more deregulation. Last year, OFCCP issued new guidelines that changed how the office detects patterns of pay discrimination, verifies affirmative action, and recognizes contractors who follow the rules. OFCCP said in these directives that it wouldn't target a contractor for pay discrimination without anecdotal evidence in addition to statistical evidence. OFCCP also said it was developing a system in which contractors who don't submit affirmative action plans will more likely come up for review. More on those directives from POLITICO's Ian Kullgren here.

IMMIGRATION

THREE IMMIGRATION BILLS CLEAR HOUSE COMMITTEE: In a marathon 11-hour markup Wednesday the House Judiciary Committee passed three immigration bills along party lines, POLITICO's Ian Kullgren and Eleanor Mueller report. The Dream Act of 2019, H.R. 2820 (116) , which passed 19-10, "would allow so-called Dreamers to remain in the U.S. for 10 years, provided that they complete high school and seek college or post-secondary skills training," Kullgren and Mueller write. The American Promise Act of 2019, H.R. 2821 (116), which passed 20-9, "would provide a path to legal status for recipients of Temporary Protected Status and Deferred Enforcement Departure, an obscure program that allows a president to grant deportation relief and access to work permits to a designated group of immigrants," report Kullgren and Mueller. The third bill, H.R. 549 (116), which passed 20-9, would "provide Temporary Protected Status to Venezuelans... in response to the economic and political crisis in that country." More here.

H-1B REGISTRATION FEE: OMB's regulatory agenda said USCIS will impose a new registration fee on employers who petition for H-1B specialty worker visas under its new electronic pre-registration system. In its final rule reworking the H-1B registration and lottery process, published earlier this year, DHS said the age ncy "may consider charging a fee in the future to recover the costs of processing registrations as well as recover costs of building, operating, and maintaining the registration system." That future has now arrived.

Major businesses leaders warned the agency during the earlier rulemaking that the new H-1B process hadn't been tested adequately and might create unforeseen problems. Business Roundtable, a coalition of prominent CEOs from companies such as Amazon, Apple, and IBM, urged delaying the rule in a December letter , arguing, among other things, that without a registration fee employers would "flood the system to improve their chances of obtaining H-1B visa slots." The new proposal would appear to address that objection. It is expected by July.

INFRASTRUCTURE WEAK?: A White House meeting with congressional Democrats about infrastructure was over practically before it began Wednesday when the president marched in, stated that he wouldn't negotiate with Democrats while they investigated him and his administration, then marched out to hold a press conference. "Wednesday's blowup," POLITICO's Quint Forgey, Burgess Everett, and John Bresnahan report, "puts to rest any hopes

that the parties will unite on a massive, multitrillion-dollar infrastructure vision anytime soon — and certainly before the 2020 election."

"One key problem," Forgey, Everett, and Bresnahan note, "is that nobody — not the president, not Congress — has put forward any realistic way to pay for all the desired spending, leaving any package little more than a political messaging tool." The Associated Press pointed out earlier this month that the infrastructure issue "aligned the nation's top business groups and unions, a rarity in Washington," and that labor and management both agreed it could be paid for by increasing the federal gasoline tax, currently 18.3 cents a gallon and last raised in 1993.

"Disappointed in the outcome of the White House infrastructure meeting," AFL-CIO President Richard Trumka tweeted. "The fight continues for a real, substantial i nvestment that creates good-paying jobs and fixes our crumbling infrastructure." More from POLITICO here.

POLITICO LAUNCHES NEW GLOBAL PODCAST: Trade. Technology. The environment. The globe is beset by profound challenges that know no political bounds. But are our world leaders up to the task of solving them? POLITICO's newest podcast, "Global Translations" presented by Citi and launching on June 6, will go beyond the headlines, uncovering what's really at stake with the most pressing issues of our time, the political roadblocks for solving them and the ideas that might just propel us forward. Subscribe to receive the first episode at launch.

ON THE HILL

PRO-LIFERS WANT PAID LEAVE: A group of conservative and anti-abortion groups, including Students for Life of America and the Family Research Council, will be on Capitol Hill today to urge passage of Senate Republicans' family leave bill. The same group met Tuesday with White House officials, including Ivanka Trump. An advocate present at the Tuesday meeting told POLITICO that the issue acquired urgency amid the heated debate about the abortion bans recently passed in Alabama, Georgia, and other states. "The pro-life movement is often criticized for not caring about children after they're born," this person said.

"That's not true and profoundly unfair. We are interested in programming to help young families — mothers and fathers — including adoption and family leave policies." Republicans' **CRADLE Act** would allow new parents to use Social Security money to take paid leave if they then delay their own retirement.

Lawmakers on Wednesday announced that Sens. Bill Cassidy, (R-La.) and Maggie Hassan (D-N.H.) will co-chair a bipartisan Senate Finance Committee working group to consider federal family leave policy. "The policy must be fiscally sustainable and not bury taxpayers in even more red ink," Cassidy said in a written statement. "We will find a bipartisan solution that empowers families and business owners to succeed."

WHAT WE'RE READING

— "U.S. businesses in China scrapping investments amid trade war," from POLITICO

— "DHS press secretary to leave post for position at State Department," from CNN

— "Labor, environmental groups call for reopening Trump's NAFTA deal," from POLITICO

— "Flu Outbreak Prompts La rgest Border Detention Center to Stop Processing Migrants," from The New York Times

— "'Newspaper-killing' Digital First Media to buy bankrupt Reading Eagle; Deep job cuts exp ected," from The Philly Inquirer

— "A Top Executive at Boeing's Troubled South Carolina Plant Is Out," from The New York Times

— "NLRB Moves Quietly to Reverse Pro-Worker Arbitration Rule," from Bloomberg Law

— Poll: "New Poll Shows Majority of CO, PA, and MI Voters Strongly Support Citizenship for Dreamers and TPS-holders," from The Immigration Hub

THAT'S ALL FOR MORNING SHIFT!

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EMPLOYMENT

Thursday, May 16, 2019

TOP NEWS

NLRB Advice Memo May Be Bad News For Fat Cat, Scabby

Banners and inflatable cat and rat balloons that unions sometimes use during demonstrations can qualify as illegal forms of secondary picketing, the National Labor Relations Board general counsel's office said in one of several advice memorandums it unveiled Tuesday.

Read full article »

Trump's OSHA Head Pick Withdraws, EEOC Chair Sworn In

The president's nominee to head the U.S. Department of Labor's workplace safety office has withdrawn his name from consideration, a source familiar with the matter said Wednesday, the same day the president's pick to helm the U.S. Equal Employment Opportunity Commission took the reins there.

Read full article »

Top Dems Unveil Proposal To Roll Back Epic Systems

Top congressional Democrats floated a bill Wednesday to upend the U.S. Supreme Court's year-old Epic Systems decision and block employers from using class action waivers that block workers from pursuing employment claims as a group.

Read full article »

Judge Not Buying IDOT's Reasons For Worker's Forced Leave

An Illinois federal judge on Tuesday said the Illinois Department of Transportation had a glaring inconsistency in its explanation for why it put a disabled traffic patrolman on paid administrative leave amid an investigation against him and can't exit the case, in a ruling that sets the stage for a trial.

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Investment Firm Can't Shake Ex-Exec's Hacking Claims

A former investment management executive accusing his ex-firm of hacking his home computer caught a break in New York federal court, with a judge saying the privacy-related claims differentiate the suit from a related action he recently dismissed.

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DISCRIMINATION

Pa. AG Faces Trimmed Claims In Age Discrimination Suit

A Pennsylvania federal court has agreed to further cut down a discrimination case filed by a former narcotics agent with the Pennsylvania attorney general's office, saying the agent hadn't provided enough of a basis for his retaliation claim and the office was exempt from certain federal labor laws.

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WAGE & HOUR

Uber Drivers' Attys Seek $5M In Fees In Classification Deal

California and Massachusetts drivers who aren't bound by Uber's arbitration

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New Cases

Discrimination (72)
ERISA (28)
Labor (44)

LAW FIRMS

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agreement asked a federal judge Tuesday to sign off on $5 million in attorney fees after they reached a $20 million deal to end long-running claims the ride-hailing giant wrongly classified drivers as independent contractors.
Read full article »

IT Co. To Pay $940K To End DOL Probe Of FLSA Violations

A Silicon Valley-based compliance solutions provider has agreed to fork over more than $940,000 for allegedly shorting a group of its workers on wages and overtime by skipping pay periods, the U.S. Department of Labor has announced.
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LABOR

Union Gets To Redo Election Due To Plant Closure Threats

A National Labor Relations Board judge has set aside the United Steelworkers' union election loss at Kumho Tires' Georgia plant and ordered a do-over, saying the company undermined the organizing campaign by repeatedly claiming the plant would close if workers opted to unionize.
Read full article »

NONCOMPETES

ADP Aims To Enforce Noncompetes For Ex-Sales Workers

Counsel for ADP LLC urged a New Jersey state appeals court Wednesday to overturn trial court rulings that the human resources company's restrictive covenants for sales employees are unenforceable, saying the panel should adopt the reasoning in a recent Third Circuit decision that held otherwise.
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PEOPLE

Morgan Lewis Nabs 2 Bracewell Partners For Dallas Office

Morgan Lewis & Bockius LLP has beefed up its Dallas presence by adding a seasoned labor and employment litigator and an experienced mergers and acquisitions attorney as partners from Bracewell LLP.
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EXPERT ANALYSIS

4 Steps For New Jersey Equal Pay Act Compliance

As New Jersey's Equal Pay Act approaches its one-year anniversary, partners at Deloitte and members at Epstein Becker discuss what employers should do now to reduce exposure to claims brought under the expansive pay equity law.
Read full article »

Series

Why I Became A Lawyer: Completing The Journey Home

My mother's connection to her Native American heritage had a major influence on my career — my decision to enter the legal profession was driven by the desire to return to my tribal community and help it in any way I could, says Jason Hauter of Akin Gump.
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LEGAL INDUSTRY

Titan Of The Plaintiffs Bar: Susman's Kalpana Srinivasan

Susman Godfrey's Kalpana Srinivasan clinched one of the largest verdicts in the country at more than $700 million in a trade secrets case last year. But she didn't initially plan to make news; she thought she wanted to cover it.
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GCs Name The 28 Best-Branded Law Firms Of 2019

Twenty-eight law firms stand out from the rest when it comes to maintaining a positive and well-recognized brand among general counsel and other decision makers inside corporate legal departments, according to a report released Wednesday.

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Analysis

Justice Stevens On His Biggest Cases And RBG Killing A Joke

In a new memoir, 99-year-old retired Justice John Paul Stevens reveals the person who changed the U.S. Supreme Court the most, what advice he gave his despondent law clerks after Bush v. Gore, and other details about life at one of the most guarded institutions.

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Controversial 9th Circ. Pick Confirmed Despite Past Writings

The Senate approved one of President Donald Trump's judicial nominees to the Ninth Circuit on Wednesday despite his past controversial statements about race and sexual assault and lack of support from home state senators.

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Channeling Trump, White House Atty Knocks Dem 'Do-Over'

The top White House lawyer told congressional Democrats on Wednesday to abandon their sweeping investigation into alleged abuses of power by President Donald Trump, calling it "political theater" and, reiterating Trump's own words, an attempted "do-over" of special counsel Robert Mueller's two-year probe.

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New Tool Strives To Help Legal Teams Push Diversity Goals

A group of legal department decision makers from Baker McKenzie and companies like Starbucks and Northwestern Mutual on Wednesday introduced a guide to help legal teams track the evolution and maturity of their diversity and inclusion programs.

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AGs Jeer Proposed Changes To Consumer Contract Guide

The attorneys general of 23 states and Washington, D.C., have urged the American Law Institute to reject proposed changes to the guidelines set by the organization to help courts deal with consumer contract cases, arguing that consumers would be harmed by what the officials perceive as a loosening of standards.

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Law Firm Leaders: Erise IP's Eric Buresh And Adam Seitz

Adam Seitz and Eric Buresh founded intellectual property boutique Erise IP in 2012, and the firm now represents clients like Apple, Sony, Ford and Sprint. Here, the pair chat with Law360 about how they work to overcome the challenges facing IP boutiques in today's legal market.

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DLA Piper Announces New Artificial Intelligence Practice

DLA Piper has launched an international artificial intelligence practice focusing on "emerging and disruptive" technologies and their accompanying legal and compliance risks, the firm announced Tuesday.

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Ex-Dewey Chair Says Charges Brought 'Waves Of Despair'

Steven Davis, the former chairman of Dewey & LeBoeuf LLP, spoke publicly Wednesday for the first time about his prosecution, urging an audience of defense lawyers to be there for their clients as they navigate "waves of despair."

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Food and Drug Administration
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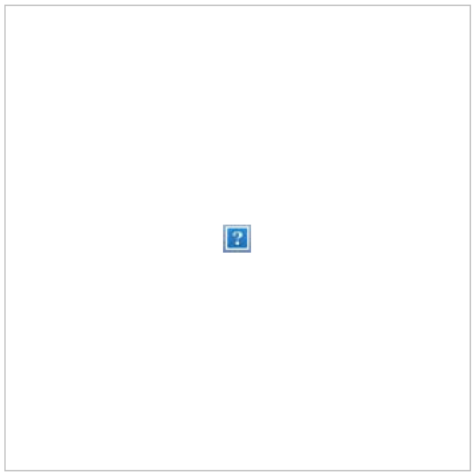

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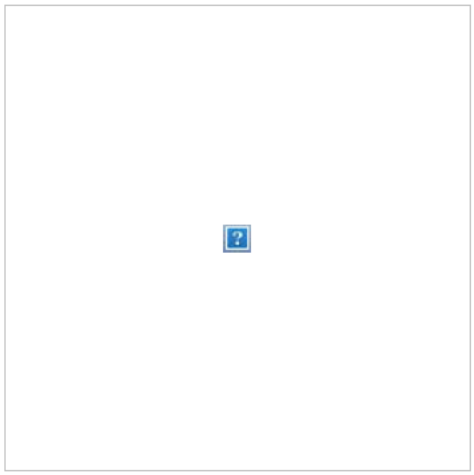

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Subject:	NLRB Sets Standards Affecting Beck Objectors, Union Lobbying Expenses Are Not Chargeable
Date:	Saturday, May 4, 2019 4:17:48 PM

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NLRB Sets Standards Affecting Beck Objectors, Union Lobbying Expenses Are Not Chargeable

03/01/2019 11:12 AM EST

Washington, DC—Nonmember objectors cannot be compelled to pay for union lobbying expenses, the National Labor Relations Board ruled today. The Board majority held that lobbying activity, although sometimes relating to terms of employment or incidentally affecting collective bargaining, is not part of the union's representational function, and therefore lobbying expenses are not chargeable to *Beck* objectors. The ruling relies on relevant judicial precedent holding that a union violates its duty of fair representation if it charges agency fees that include expenses other than those

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EMPLOYMENT

Thursday, May 23, 2019

TOP NEWS

Analysis

NLRB Targets Grad Student Unions In New Reg Agenda

The National Labor Relations Board is planning to unveil regulations that clarify whether graduate student assistants at private universities can unionize and the U.S. Department of Labor will seek public feedback on a potential update to rules governing the Family and Medical Leave Act, according to a regulatory road map the federal government released Wednesday.

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Sex Bias Accuser Says MoFo Sabotaged Her Job Hunt

One of seven lawyers behind a proposed class action accusing Morrison & Foerster LLP of sex discrimination says the firm sabotaged her job prospects at three BigLaw firms after firing her for getting pregnant.

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Union Launches New VW Election Push After NLRB Loss

The United Auto Workers asked the National Labor Relations Board again Wednesday to let workers at Volkswagen's Tennessee plant vote to organize, hours after a split NLRB panel rejected an election petition the

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union filed last month.
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4th Circ. OKs Time Warner Worker's Jury Win In Age Bias Suit

A Fourth Circuit majority on Wednesday affirmed a fired Time Warner Cable worker's $335,000 jury win over the "croaks" from a dissenting member, saying the worker offered enough evidence that the company used her fudging a date on a form as an excuse for firing her because of her age.
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Analysis

How A 1925 Law Evolved To Become Crucial For Employers

Nearly a century after its passage, the Federal Arbitration Act of 1925 has taken on a life experts say its drafters never imagined. In the third of a four-article series marking the anniversary of the Epic Systems ruling, Law360 charts how a law envisioned as a narrow procedural reform ended up with a starring role in the biggest employment decision of 2018.
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DISCRIMINATION

Tesla's Bid To Arbitrate Race Bias Suit Runs Out Of Juice

Tesla can't send to arbitration a proposed class action claiming it tolerated harassment toward black workers at one of its plants, a California appellate court said Tuesday in affirming a lower court's finding that the electric-car maker can't enforce a contract the accuser never signed.
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Ex-Student Sues U. Of Miami, Prof Over Sexual Harassment

The University of Miami acted with "deliberate indifference" when it failed to address a professor's harassment of a former business school student who was dismissed after he campaigned to have her removed, according to a lawsuit filed Wednesday in a Florida federal court.
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Boston Police Officers Seek Class Cert. In Test Bias Suit

A group of more than two dozen Boston police officers are seeking class certification for the remedy stage of a case in which a Massachusetts federal judge ruled that a test for cops seeking a promotion violated anti-discrimination laws.
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Judge Confirms DOD Must Provide Docs In HIV Policy Dispute

A Virginia federal judge on Wednesday largely affirmed a magistrate's order requiring the U.S. Department of Defense to cough up hundreds of allegedly privileged documents as part of a challenge to its HIV policy, but allowed the Pentagon to hold back certain draft documents.
Read full article »

WAGE & HOUR

Cremation Co. To Pay $1.7M To End Sales Reps' Wage Suit

A California federal judge has greenlighted a settlement of about $1.7 million for a proposed class of sales representatives who claimed a cremation company orchestrated an "elaborate scheme" to avoid paying minimum wages and overtime by misclassifying them as independent contractors.
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NLRB Says Guard's Heated Chat Cost Her Labor Law Defense

The National Labor Relations Board has agreed with an administrative law

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judge's finding that an Entergy Nuclear Operations Inc. security guard wasn't wrongly disciplined when she was given a verbal warning after a heated conversation with a co-worker about the removal of a water cooler.

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TRADE SECRETS

Amgen Says Rival Used Trade Secrets To Poach 14 Reps

Amgen should be allowed to pursue its claim that rival biopharmaceutical company Karyopharm Therapeutics used its trade secrets to poach 14 of Amgen's top sales reps in a single day, an Amgen attorney told a state court judge Wednesday in Boston's Business Litigation Session.

Read full article »

WORKER SAFETY

Lands' End Uniforms Make Delta Workers Sick, Suit Says

Delta Air Lines Inc. employees on Wednesday hit Lands' End with a proposed class action in New York federal court, alleging that its "Passport Plum" uniforms have caused some flight attendants to fall ill and others to lose their hair.

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WRONGFUL TERMINATION

Downsizing Senior NY Judge Tells Litigants, 'I'll See You'

Senior U.S. District Judge John F. Keenan told a group of lawyers involved in thorny dual-track privacy and financial services employment litigation Wednesday that he's scaling back his caseload, saying: "Good luck with it all. I'll see you!"

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EXPERT ANALYSIS

Arbitration Pacts In Franchising: One Size Doesn't Fit All

Many franchise companies have started to shift away from making arbitration the default and preferred method for dispute resolution. But considering whether to require binding arbitration of franchise disputes can be a million-dollar question, says Doug Knox of Spencer Fane.

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LEGAL INDUSTRY

Large Firms Drive Spike In Associate Starting Salaries

The median starting salary in the legal industry shot up nearly 15% between 2017 and 2019, with some of the most significant pay hikes happening at the largest firms, according to a report released on Wednesday.

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Senate Confirms Cooper Partner Who Disparaged Gay Judge

The Senate confirmed four more of President Donald Trump's judicial nominees Wednesday, including a Cooper & Kirk partner who previously defended California's same-sex marriage ban by making disparaging comments about the sexuality of the judge who presided over the case.

Read full article »

9th Circ. Nominee Breaks With Pack, Endorses Brown Ruling

A White House pick for the Ninth Circuit on Wednesday broke from the script repeatedly used by many of President Donald Trump's court nominees and endorsed the Supreme Court's Brown v. Board of Education decision, telling the Senate Judiciary Committee he can discuss the ruling because it doesn't face judicial review.

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Dems Object To 9th Circ. Pick Who Doesn't Live In Calif.

Senate Democrats fumed in a hearing Wednesday over President Donald Trump naming a Washington, D.C., attorney who has California ties but hasn't lived in the state for years to the Ninth Circuit, saying the move underscores the abandonment of courtesy to home state senators in judicial nominations.

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Analysis

Latest White House Counsel Touted As 'Savvy' Problem Solver

President Donald Trump's new White House counsel has built a solid reputation as a commercial litigator in D.C. who has stayed — until now — largely outside of politics. But while he may be venturing into new territory, those who know Pat Cipollone say he's the kind of guy who "just gets it" and may even be able to bring a measure of calm to the notoriously chaotic Trump White House.

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Avenatti Charged With Stealing Stormy Daniels' Book Money

Michael Avenatti's legal problems continued to pile up Wednesday, with new federal charges in New York alleging he stole money from a book deal signed by his most famous ex-client, porn actress Stormy Daniels.

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Craig Can Get More Info In Already 'Extremely Detailed' Case

Gregory Craig, the ex-Skadden partner accused of lying to U.S. Department of Justice officials about his alleged role in Paul Manafort's overseas lobbying, should get a few additional details about the government's false statement charges against him, a D.C. federal judge has said.

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Analysis

Does 3rd-Party Funding Belong In Investment Arbitration?

Nations and other stakeholders have been struggling to strike a balance in regulating the widespread use of third-party funding in investment arbitration amid criticism that it encourages frivolous claims and causes disproportionate funding within the investor-state dispute settlement regime.

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Walmart Hires International Compliance Chief From Oil Sector

Walmart is continuing its legal hiring spree with the announcement Wednesday that a former federal prosecutor who spent the last seven years leading ethics and compliance programs at oil service providers will manage compliance at Walmart's 6,000 locations outside the United States.

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Law Firm Leaders: Desmarais LLP's John Desmarais

Desmarais LLP founder John M. Desmarais speaks to Law360 about the benefits of being a boutique, the drawbacks of the billable hour and the limitations of BigLaw.

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Subject:	Noah"s Ark Processors LLC, 14-CA-224183 et al. - Section 10(j) results
Date:	Friday, May 10, 2019 11:52:42 AM
Attachments:	ILB.internalresults.14-CA-224183.NoahsArk.docx Noah"s Ark Final 10j Order 5-10-19.pdf

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On February 8, 2019, the Board authorized the institution of Section 10(j) proceedings in this bad-faith bargaining case involving, among other things, the Employer's surface bargaining, refusal to provide information, implementation of final offer in the absence of a good-faith impasse, discharge of ten employees engaged in a protected work stoppage, and several independent 8(a)(1) violations. The Region was directed to seek, among other things, an interim order to bargain on a schedule, rescind unilaterally implemented changes, reinstate the ten employees, and a broad cease and desist order.

On May 10, 2019, the District Court of Nebraska issued the attached order granting most of the injunctive relief requested, including an order to bargaining on a specified schedule, rescind changes, reinstate employees, and to cease and desist from most of the alleged violations. The court did not find a likelihood of success on allegations that the Employer violated 8(a)(1) by providing more than ministerial aid for employees to revoke union dues authorization or for providing legal representation to employees subpoenaed by the Board. Accordingly, the court did not grant "cease and desist" relief for those violations.

Thanks,
LaDonna Shorter
Administrative Assistant
Division of Advice
(202) 273-3809
email: LaDonna.Shorter@nlrb.gov

UNITED STATES GOVERNMENT

memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: May 10, 2019

TO: Peter B. Robb
General Counsel

FROM: Jayme L. Sophir
Associate General Counsel

SUBJECT: Noah's Ark Processors LLC d/b/a WR Reserve
Case 14-CA-224183 et al.

On February 8, 2019, the Board authorized the institution of Section 10(j) proceedings in this bad-faith bargaining case involving, among other things, the Employer's surface bargaining, refusal to provide information, implementation of final offer in the absence of a good-faith impasse, discharge of ten employees engaged in a protected work stoppage, and several independent 8(a)(1) violations. The Region was directed to seek, among other things, an interim order to bargain on a schedule, rescind unilaterally implemented changes, reinstate the ten employees, and a broad cease and desist order.

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/s/
J.L.S.

Attachment

cc: The Board
Solicitor's Office
Executive Secretary
Operations Management

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LEONARD J. PEREZ, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. NOAH'S ARK PROCESSORS, LLC d/b/a WR RESERVE, Respondent.	4:19-CV-3016 MEMORANDUM AND ORDER

The Regional Director of the National Labor Relations Board has, on its behalf, petitioned pursuant to § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) (NLRA), to enjoin alleged unfair labor practices engaged in by the respondent, Noah's Ark Processors.[1] As explained below, the Court is at least partly persuaded that that the Board is likely to succeed on its claims that Noah's Ark has engaged in unfair labor practices, and that the remedial purposes of the NLRA would be frustrated unless some immediate action is taken pending the Board's administrative enforcement proceedings. Accordingly—although the Board will not get everything it asked for—the Court will grant the Board's petition.

[1] There was a change of ownership during the term of the previously operative collective bargaining agreement, and a change of name during the underlying events. *See* filing 14 at 37, 46. Neither party brings up any issue relating to the changes, so for the sake of simplicity the Court will refer to the respondent as "Noah's Ark" throughout.

I. BACKGROUND

Noah's Ark is engaged in "the slaughter, processing, packaging and non-retail sale of meat products" in Hastings, Nebraska. Filing 1 at 3. It was party to a January 2013 collective bargaining agreement (CBA) with the United Food and Commercial Workers Union Local No. 293; that CBA expired on January 28, 2018. Filing 18-4 at 1-12.

Starting in November 2017, the Union requested information from Noah's Ark so it could prepare to negotiate a successor agreement to the expiring 2013 CBA. Filing 18-4 at 17-19. That request was renewed in December 2017 and repeatedly in January, February, and March 2018. Filing 18-4 at 20-37. The information was not provided. Filing 18-4 at 18-37.

At a supervisor-employee meeting in late 2017 or early 2018, the Noah's Ark operations manager told employees that the Union would be removed from the plant. Filing 15 at 77-78, 148. According to one employee, the workers asked for raises, and in responding the operations manager told them that "there's no union in the plant" and Noah's Ark would "get rid of [the Union]" because "they didn't allow them." Filing 15 at 19. According to another employee, the workers were told that raises could be given because of the Union's removal. Filing 15 at 149.

At the same time, the Union was trying to get Noah's Ark to actually engage in collective bargaining. *See* filing 18-4 at 20. The Union asked Noah's Ark for some dates to meet, but Noah's Ark did not respond. Filing 18-4 at 20-23. Eventually, Noah's Ark offered to meet with the Union in Perth Amboy, New Jersey. Filing 18-4 at 26. The Union suggested that Hastings, Nebraska would be better. Filing 18-4 at 26. Noah's Ark countered with negotiations in Grand Island, Nebraska and offered a number of dates in March 2018. Filing 18-4 at 28. The Union accepted any of the dates offered, "provided that [Noah's

Ark] provides the requested information in the near future as indicated." Filing 18-4 at 28. Eventually, they agreed to at least start in Grand Island on March 22. Filing 18-4 at 33. At that meeting, Noah's Ark simply received the Union's contract proposal and offered nothing of its own. Filing 18-4 at 37. For further negotiations, Noah's Ark offered April 25 and May 9. Filing 18-4 at 37. On March 28, 2018, the Union filed an NLRB charge based on Noah's Ark's failure to bargain in good faith with the Union. Filing 3 at 3-4.

Meanwhile, on March 27, 2018, a group of employees gathered in the cafeteria, intending to discuss with management the hiring of a new employee at a higher wage than more senior employees. Filing 14 at 258-60. A Noah's Ark superintendent was asked why some people were making more than others, and why raises hadn't been given. Filing 14 at 266. The superintendent replied that it was because of the Union contract. Filing 14 at 266.

The superintendent left, and returned after 15 minutes accompanied by the operations manager. Filing 15 at 269. The meeting had started before the employees' shift, but by this time they were scheduled to be at their stations. Filing 17 at 142-43. The operations manager told the employees that anyone who didn't want to work could go home. Filing 14 at 270. The employees left, but the operations manager told the superintendent to write down the names of some employees, because "[h]e didn't want those employees back into the building." Filing 14 at 270-71.

When the group reached the parking lot, they spoke with the plant manager, who told them that they should go back to their workstations and discuss the problem that day after work. They refused, explaining that if they "went in back to the building and worked that day, they would forget about the issue and [they] wouldn't have a solution to what [they] had asked for." Filing 14 at 275. In response, the plant manager told them that they could either go

back to work or leave the premises. Filing 17 at 96. They were told that if they didn't leave, police would be called. Filing 14 at 276; filing 17 at 98. Ten employees were fired. Filing 18-4 at 256-66; *see also* filing 15 at 150-52, 158-61, 167-72, 182-90.

At some point, the Noah's Ark human resources manager created a preprinted form for employees to sign if they wanted to withdraw from the Union and stop Union dues from being deducted from their pay. Filing 16 at 27-28. Some of the forms were only in English, while others were in English and Spanish. *See* filing 18-2 at 120-34; filing 18-4 at 132-80. About 60 signed forms were collected from employees between September 2017 and July 2018. Filing 16 at 27; filing 18-2 at 120-34; filing 18-4 at 132-80. However, each employee whose testimony about signing the form is cited by the Board explained that they had been provided with the form *after* they approached the Noah's Ark human resources manager and asked how to stop paying union dues. *See* filing 13 at 4; filing 15 at 49, 86, 126, 136-37, 202-03.[2]

Noah's Ark also prepared a form captioned, "Request for Nondisclosure of Confidential Employment Information." *See* filing 18-4 at 181-231. The form was written in English, and generally indicated that the signing employee did not want Noah's Ark to disclose "confidential information"—such as identification data and information about hiring, salary, performance, or benefits—to be disclosed without the employee's written consent. *See* filing 18-4 at 181. Noah's Ark collected about 50 signed forms. Filing 16 at 39. Dates on the forms varied, but they were mostly between early and mid-2018. *See* filing

[2] Another witness testified that she had seen the HR manager approach some other employees in their work area and provide them with some forms to sign. Filing 15 at 69-75. But those employees didn't testify, and there's nothing in the record about whether they had previously asked to withdraw from the Union or stop the dues checkoff.

18-4 at 181-231. The types of information listed on the nondisclosure form bear significant similarity to the information previously requested from Noah's Ark by the Union. *Compare* filing 18-4 at 17-19 *with* filing 18-4 at 181.

One employee, who could not read English, testified that he had signed the nondisclosure form after being told that it was necessary to complete his removal from the Union. Filing 15 at 88-91. That employee had previously authorized providing his information to the Union, and it's not clear from the record whether he understood the effect of signing the subsequent form. *See* filing 15 at 88-96. Two other employees who had left the Union identified their signatures on the forms, but didn't remember signing them. Filing 15 at 126-27, 203-04. And one of them also said that because the form was in English, she didn't know what it said. Filing 15 at 204.

The parties finally met again on May 15, 2018, and Noah's Ark did offer a written proposal. Filing 18-4 at 341. And in June 2018, the parties settled the NLRB bad-faith bargaining charge pursuant to a settlement agreement that required Noah's Ark to provide the Union with the information it had requested and hold bargaining sessions "no less than 24 hours per month for at least six hours per session, or in the alternative, on any another schedule to which the Union agrees." Filing 18-4 at 122-25.

On July 13, Noah's Ark provided information for 15 employees. Filing 18-4 at 274-91. The information on even those 15 employees appears to be incomplete, and as far as the record indicates, no other information has been provided on any of the other employees potentially in the bargaining unit.[3] Eventually, information obtained from Noah's Ark by the Board revealed that

[3] The record reflects differing estimates on the size of the bargaining unit, but it appears to be somewhere between 250-350 workers.

Noah's Ark had unilaterally raised employee wages, without discussing them with the Union. *See* filing 17 at 47-48; filing 18-1 at 176-178.

The Union returned to the NLRB with a July 23 charge, alleging among other things that Noah's Ark had refused to bargain in good faith and had engaged in various unlawful anti-Union activities. Filing 3 at 6-7. Additional charges, and amended charges, were filed in August, September, November, and December 2018, and February 2019. Filing 3 at 8-24. Those charges, as consolidated, form the basis of the underlying administrative proceeding. Filing 3 at 25-37.

As part of its investigation, the Board issued subpoenas to a number of Noah's Ark employees. *See, e.g.*, filing 18-2 at 19. Interviews with the subpoenaed employees were scheduled for November 7, 2019. *See* filing 18-2 at 19; filing 18-3 at 11. In late October, Noah's Ark retained Kutak Rock, LLP to provide legal counsel to the subpoenaed employees. Filing 18-3 at 1-13. A "Notice to Employees" was provided—in English and Spanish—informing employees that they might be contacted by the Board, that they had the right to have legal counsel when speaking to the Board, and that they could contact the Kutak Rock attorneys that Noah's Ark would pay for "as a benefit to our employees." Filing 18-4 at 253-55.

Although the notice said that employees were "not required or compelled to report to or consult with [Noah's Ark] regarding obtaining legal counsel," at least one employee testified that he had been told by a plant manager that he "needed a company attorney" and that it was "mandatory" to speak with "the company attorney." Filing 15 at 53-54; filing 18-4 at 253. Other employees reported simply being sent to the office, where counsel was waiting to speak to them. Filing 15 at 128-29, 139-40. One employee also reported that after the

interview, the plant manager questioned him about what the NLRB agent had asked. Filing 15 at 58-60.

In the meantime, the parties had been engaged in "negotiations." The parties met on July 13, but unlike previous meetings at which Noah's Ark had been represented by its legal counsel, Noah's Ark was now represented by "Administrative Clerk Mary Junker." Filing 18-4 at 341. According to the Union's representative, before the meeting even started, Junker said something to the effect of, "I don't know why I am here. I don't know why they sent me. I can't make any decisions." Filing 17 at 28. At the next session, on July 27, Junker was accompanied by a plant manager, but he only observed. Filing 17 at 29. Junker appeared alone at the next two meetings, on August 17 and 22. Filing 18-4 at 341. Junker testified that she was not authorized to agree to the Union's proposals; instead, her function was to bring the Union's proposals back to ownership. Filing 14 at 67.

At the August 17 meeting, the parties did agree on a few aspects of the Union's initial March 22 proposal: they agreed to move certain language from the management rights provision of the CBA to the seniority provision, they agreed to clarify that "benefits" meant health benefits, and they agreed to update the anti-discrimination provisions of the CBA. Filing 14 at 81. Junker did not have answers, at that meeting, to the modified written proposal the Union had provided on July 27. Filing 14 at 82; *see* filing 18-4 at 341. But at an August 30 meeting, Noah's Ark rejected that proposal. Filing 18-4 at 343.

After that, the parties settled into a cycle of "negotiation": the Union would offer a proposal, and then at the next meeting (usually a week later) Noah's Ark would reject that proposal, but make no counterproposal. *See* filing 18-4 at 343-44; *see also* filing 14 at 87. Junker was the sole representative for Noah's Ark at each meeting. *See* filing 18-4 at 343-44. Noah's Ark rejected five

more Union proposals this way, until the January 2, 2019 meeting at which Noah's Ark finally offered another proposal: its "Best and Final Proposal." Filing 18-4 at 81, 343-44.

The Best and Final Proposal did not include the matters on which the parties had previously agreed on August 17, 2017, and did not say anything about wages. Filing 18-4 at 81-83; *see* filing 17 at 40-46; *see also* filing 18-4 at 7-8. At a final meeting on January 25, 2019, the Union's representative asked several questions about the Best and Final Proposal; Junker answered and the meeting adjourned. Filing 17 at 49. No deadline to respond to the Best and Final Proposal was expressed. Filing 17 at 45, 47, 49. Nonetheless, on January 30, Noah's Ark declared an impasse and unilaterally implemented the Best and Final Proposal. Filing 14 at 97-98; filing 18-4 at 84, 117.

II. DISCUSSION

Section 10(j) of the NLRA authorizes the Board to seek, and the Court to grant, "such temporary relief or restraining order as it deems just and proper" pending disposition of the Board's administrative proceedings. First enacted in 1947, § 10(j) is a limited exception to the federal policy against labor injunctions. *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1037 (8th Cir. 1999). Section 10(j) is reserved for a more serious and extraordinary set of circumstances where the unfair labor practices, unless contained, would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal NLRB channels. *Minnesota Min. & Mfg. Co. v. Meter for & on Behalf of NLRB*, 385 F.2d 265, 270 (8th Cir. 1967); *see Sharp*, 172 F.3d at 1034.

In making that decision, the Court applies the familiar four-factor test for establishing the propriety of preliminary injunctive relief. *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844-45 (8th Cir. 2011); *Sharp*, 172 F.3d at 1038-

39; *see Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). That test weighs the threat of irreparable harm to the movant, the balance of harms, the movant's likelihood of success on the merits, and the public interest. *McKinney ex rel. NLRB v. S. Bakeries, LLC*, 786 F.3d 1119, 1122-23 (8th Cir. 2015) (citing *Dataphase*, 640 F.2d at 113).

1. IRREPARABLE HARM

The Court's inquiry must focus initially on the question of irreparable harm: the Board must demonstrate "that the case presents one of those rare situations in which the delay inherent in completing the adjudicatory process will frustrate the Board's ability to remedy the alleged unfair labor practices." *Id*. at 1123; *Sharp*, 172 F.3d at 1039. The relevant inquiry is whether this is the rare case when a preliminary injunction is necessary to preserve the effectiveness of the ordinary adjudicatory process. *McKinney*, 786 F.3d at 1124.

Thus, the irreparable harm to be addressed under § 10(j) is not harm to individual employees—rather, it is the harm to the collective bargaining process or to other protected employee activities if a remedy must await the Board's full adjudicatory process. *See Sharp*, 172 F.3d at 1038; *Hubbel v. Patrish LLC*, 903 F. Supp. 2d 813, 817 (E.D. Mo. 2012); *Chester ex rel. NLRB v. Eichorn Motors, Inc.*, 504 F. Supp. 2d 621, 627 (D. Minn. 2007). The Court must be able to conclude with "reasonable probability" from the circumstances that the remedial purposes of the NLRA would be frustrated unless immediate action is taken. *Minnesota Min. & Mfg. Co.*, 385 F.2d at 270; *see Sharp*, 172 F.3d at 1039. The Court proceeds to examine the likelihood of success on the merits, and the other relevant factors, only if the Board clears the "relatively high hurdle" of establishing irreparable injury. *McKinney*, 786 F.3d at 1123; *see Sharp*, 172 F.3d at 1039.

If an employer replaces pro-union employees with nonunion employees, continues to blatantly violate the NLRA, or refuses to bargain and unilaterally withdraws recognition from a union that has demonstrated support, a preliminary injunction may appropriately prevent or counteract the decline in support for the union that is likely to follow. *See McKinney*, 786 F.3d at 1124-25. Here, the Board argues that irreparable harm will come from Noah's Ark's ongoing refusal to engage in collective bargaining:

> refusal to bargain in good faith is likely to irreparably erode employees' support for their chosen representative over time because the Union is unable to protect the employees or affect their working conditions while the case is pending before the Board. The employees predictably will shun the Union because their working conditions will have been virtually unaffected by collective bargaining for several years, and they will have little, if any, reason to support the Union. This lost support for the Union will not be restored by a final Board order in due course. By the time the Board issues its final order, it will be too late; employees will have given up on their union.

Filing 2 at 31. The Court agrees. As the Board points out, eroding support for the Union is already reflected in the record: a number of employees have already asked to stop paying Union dues, and given the timing, it's not hard to connect that to the Union's ineffectual efforts to negotiate on the employees' behalf. But that ineffectiveness is attributable to Noah's Ark's obstruction.[4]

[4] There is, in other words, nothing to suggest that the Union's loss of support preceded Noah's Ark's unfair, anti-Union labor practices. *Cf. McKinney*, 786 F.3d at 1124-25.

And the Board's ultimate remedial action is likely to have little effect if it only results in compelling Noah's Ark to engage in collective bargaining with a Union that's already lost its base of support.

In addition, as will be discussed below, the Court finds that the Board is at least reasonably likely to succeed on its claim that several employees were unlawfully fired. The Court recognizes that the purpose of preliminary injunctive relief in this context is to protect the collective bargaining process, not individual employees—but, at least attempting to reinstate those employees is part of preserving the Board's authority to provide effective relief, and vindicating the Union's authority to represent its bargaining unit. And while a substantial time has passed since those terminations, the passage of even more time will further decrease the likelihood that those workers will be available for reinstatement. *See Chester*, 504 F. Supp. 2d at 628.

In sum, Noah's Ark's blatant failure to engage in good-faith collective bargaining, and refusal as a practical matter to recognize the Union at all, establishes the propriety of preliminary injunctive relief to "appropriately prevent or counteract the decline in support for the union that is likely to follow." *McKinney*, 786 F.3d at 1124-25.

2. Likelihood of Success on the Merits

The Court must consider the Board's likelihood of success on the merits, not in isolation, but in the context of the relative injuries to the parties and the public. *Sharp*, 172 F.3d at 1039. The purpose of this inquiry into the merits is not to second guess the Board's decision to commence enforcement proceedings. *Id*. Rather, likelihood of success is relevant to the issuance of a preliminary injunction because the need for the Court to act is, at least, in part, a function of the validity of the applicant's claim. *Id*. A party seeking injunctive relief need not necessarily show a greater than 50 percent likelihood that it will

prevail on the merits. *Planned Parenthood Minnesota, ND, SD v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008). But an absence of a likelihood of success on the merits strongly suggests that preliminary injunctive relief should be denied. *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013).

The Board's supplemental brief on the administrative record (filing 13) organizes the evidence into eight categories—four ways in which Noah's Ark allegedly interfered with, restrained, or coerced employees in the exercise of their protected rights, in violation of § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), and four ways in which Noah's Ark allegedly refused to bargain collectively in violation of § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). The Court will consider the Board's likelihood of success in each area.

(a) Section 8(a)(1)

Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees the right to organize and bargain collectively, and under § 8(a)(1), an employer commits an unfair labor practice if it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of their rights" under § 7. *S. Bakeries, LLC v. Nat'l Labor Relations Bd.*, 871 F.3d 811, 820 (8th Cir. 2017).

(i) Anti-Union Statements

The first thing the Board points to as a violation of § 8(a)(1) is perhaps the most obvious: statements by Noah's Ark management that Noah's Ark intended to get rid of the Union. *See* filing 13 at 2. Such statements have been seen not only as context for other alleged violations of § 8, but as violations of § 8(a)(1) in their own right. *See NLRB v. Hardesty Co.*, 308 F.3d 859, 866-67 (8th Cir. 2002). There is also evidence that Noah's Ark directly connected pay raises to removal of the Union—which is perhaps more important, because it's crystal-clear that an employer violates § 8(a)(1) by offering employees benefits

conditioned on their choice of a bargaining representative. *Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 841 (8th Cir. 1998). And Noah's Ark does not even attempt to defend those remarks. *See* filing 19.

(ii) Firings

The next issue, though, is hotly contested: the Board contends that Noah's Ark violated § 8(a)(1) with its March 27, 2018 firing of several of the employees who had gathered in the cafeteria to address wage differences with management. *See* filing 13 at 2-3. The Board characterizes their walkout as a "work stoppage" protected by § 7. Filing 13 at 2-3. Noah's Ark, on the other hand, insists that the employees abandoned their jobs, rather than being fired—and that even if they were fired, their conduct was an "unprotected wildcat strike." Filing 19 at 6-10.

The Court finds little merit to the argument that the employees weren't fired—rather, they were told that they could either return to work (as opposed to addressing their grievance) or be removed by police. For present purposes, there's at least a reasonable likelihood that the Board will succeed on its claim that the employees were fired. So, according to Noah's Ark, that places the case in the rubric of *Wright Line*, 251 NLRB 1083 (1980). Filing 19 at 7. The Court isn't so sure about that.

The *Wright Line* analysis "is applied when an employer articulates a facially legitimate reason for its termination decision, but that motive is disputed." *Tschiggfrie Props., Ltd. v. Nat'l Labor Relations Bd.*, 896 F.3d 880, 885 (8th Cir. 2018). It's a burden-shifting framework:

> The Board's General Counsel must prove that the employee's protected conduct was a substantial or motivating factor in the adverse action. If, and only if, the General Counsel meets that

> burden, the burden shifts to the employer to exonerate itself by showing that it would have taken the same action for a legitimate, nondiscriminatory reason regardless of the employee's protected activity.

Id. (cleaned up). But there's no real disagreement here about *why* the employees lost their jobs: because they gathered in the cafeteria to complain about their wages, and didn't return to work from the parking lot when the plant manager gave them a choice. Noah's Ark has admitted as much. In other words, this isn't a paradigmatic *Wright Line* case because the reason for termination isn't disputed. So, the real question is whether the employees' activity was protected by § 7.

Noah's Ark contends that the employees were engaged in a strike, not authorized by the Union—so, it was a "wildcat strike" unprotected by the NLRA. Filing 19 at 7. And it has been held that while a "total strike" is a concerted activity protected against employer interference by §§ 7 and 8(a)(1), deliberate "slowdowns" and "walkouts" by the employees to exert pressure on the employer to accept bargaining demands are unprotected concerted activities, and the employer is free to discharge the participating employees for their unlawful disloyal tactics. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965).

It's clear, though, that an employer violates § 8(a)(1) by discharging *even a non-union employee* for organizing or implementing a collective walkout to protest working conditions. *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 840 (8th Cir. 2003). "To be considered *concerted* activity, [i]t is sufficient that the employee intends or contemplates, as an end result, group activity which will also benefit some other employees." *Id.* (internal quotation omitted).

In that regard, the Court finds it difficult to distinguish the Eighth Circuit's decision in *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989). In that case, the employees were non-union mechanics who asked their employer's president to meet with them to discuss grievances about pay, supplies, and improper treatment. *Id.* at 1356. They gathered in the break area and refused to work until the company president met with them. *Id.* They were told that they had the options of going to work, leaving the premises, or remaining on the premises and being fired. *Id.* at 1357. So, they left, and worked the next day without incident. *Id.* But then they found out that their supervisor had been fired, and they had seen that the employer placed a newspaper advertisement offering a starting bonus for new mechanics, leading them to believe they would be replaced. *Id.* They met outside the facility early the next morning, and went to a nearby restaurant to discuss their next move. *Id.* They decided to request another meeting to address their concerns, but when they came back to work, they were told they had been fired. *Id.*

The NLRB found for the mechanics on their § 8(a)(1) claim, and on appeal, the Eighth Circuit agreed. The Eighth Circuit rejected the employer's claim that the employees had engaged in a "sitdown strike" or "intermittent or recurrent strike"—in essence, a wildcat strike—explaining that "[t]he evidence shows that this work stoppage was a peaceful attempt by unsophisticated workers to notify the company—which did not have a grievance procedure—of their dissatisfaction with working conditions because other methods of communication had proven futile." *Id.* at 1359. And they "did not have a preconceived plan to engage in a series of strikes to harass the [employer]." *Id.*; *see also NLRB v. EYM King of Mo., LLC*, 726 F. App'x 524, 526 (8th Cir. 2018).

The Court recognizes one potential distinction: there's no indication in *Roseville Dodge* that the employees *had* a union. And that can matter. *See*

Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975). But the Court's not persuaded it's a meaningful difference in this case. *See Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1508 (8th Cir. 1993). Specifically, the Court isn't persuaded that Noah's Ark can rely on the no-strike provision of the 2013 CBA, *see* filing 19 at 8, when it had allowed that contract to expire. And more generally, the Court's not persuaded that Noah's Ark can assert, "But they had a union!" as a defense where the record is replete with evidence that Noah's Ark refused to meaningfully engage with the Union. The Court will address that in more detail below, but at this point it suffices to say that having done everything it could to marginalize the Union, Noah's Ark shouldn't be allowed to rely on the Union's survival to justify firing employees who would otherwise have clearly been engaged in concerted activity protected by § 7.

The Court finds that the Board is sufficiently likely to succeed on the merits of its claim that Noah's Ark fired employees for activity protected by § 7, in violation of § 8(a)(1).

(iii) Ministerial Aid

Next, the Board asserts that Noah's Ark violated § 8(a)(1) by providing "more than ministerial aid" to employees who wanted to resign from the Union and revoke their dues checkoff authorizations. Filing 13 at 3. The Court is less persuaded by the Board's argument on this point.[5]

[5] The Board also relies on Noah's Ark's solicitation of confidentiality forms in support of this argument. *See* filing 13 at 4-5. But it's not clear to the Court how that interfered with, restrained, or coerced employees *in the exercise of their protected rights*—that is, it's not clear why the confidentiality forms would amount to a § 8(a)(1) violation. Rather, those forms are relevant to the Board's claim of a § 8(a)(5) violation, and will be addressed in that context.

An employer does violate § 8(a)(1) by discouraging employees from engaging in union activity. *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 909 (8th Cir. 2004). So, it's a violation of § 8(a)(1) for an employer to actively support or sponsor an effort to reduce employee support for a union. *See NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991). But the NLRB has interpreted the NLRA to permit an employer to provide "ministerial aid" to employees seeking to leave a union. *See E. States Optical Co.*, 275 NLRB 371, 372 (1985).

The parameters of the "ministerial aid" standard are not entirely clear. *See Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 164 (1st Cir. 2005); *Vic Koenig Chevrolet, Inc. v. NLRB*, 126 F.3d 947, 949-50 (7th Cir. 1997). The Seventh Circuit has held that the line is crossed only when the employer's "assistance to the employees who are seeking to disconnect from the union . . . interfere[s] with employee free choice." *Vic Koenig Chevrolet, Inc.*, 126 F.3d at 950.

But regardless of where the line between "ministerial aid" and active sponsorship is drawn, the Court finds little evidence that it was crossed here. It has been held permissible, for instance, not only for an employer to process employee requests to revoke dues checkoff authorizations, but to bring the employees' right to do so to their attention, and to furnish information about how to do so upon request. *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1231 (5th Cir. 1984); *Landmark Int'l Trucks, Inc. v. NLRB*, 699 F.2d 815, 820 (6th Cir. 1983). And the evidence here is that the employees whom Noah's Ark provided with revocation forms to sign were provided with those forms *after* proactively asking to rescind their dues checkoff.

Now, that does not mean the Administrative Law Judge, who heard and observed the witnesses, could not conclude otherwise. It's certainly not beyond

the pale, given the anti-Union animus reflected in the rest of the record, to suspect that some chicanery might have been involved in the decisions of a significant number of employees to revoke their dues checkoffs. *See NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 968 (8th Cir. 2005) (relying on circumstantial evidence of anti-union animus to support § 8(a)(1) violation). But the Court's best reading of the record does not support a likelihood that the Board will succeed on this claim.

(iv) Provision of Counsel

Finally, the Board argues that Noah's Ark violated § 8(a)(1) by providing outside counsel for employees subpoenaed by the Board. The Court has serious reservations about the propriety of that conduct—but, the Court has trouble seeing how it proves a violation of § 8(a)(1). Perhaps there is some proscription against conduct that interferes with a Board's investigation of allegedly unfair labor practices—but § 8(a)(1) prohibits interference with *employees* engaged in protected activity, not the Board.

The authority cited by the Board in support of its argument is not persuasive. *See* filing 2 at 20. To begin with, the Board relies on *Midwest Television, Inc., d/b/a KFMB Stations & Am. Fed'n of Television & Radio Artists, San Diego Local*, 349 NLRB 373 (2007) and *S.E. Nichols, Inc.*, 284 NLRB 556 (1987)—but in each of those cases, the employer had offered employees counsel from *the employer's attorney*, and the conflict of interest was the issue. *See Midwest Television*, 349 NLRB at 387; *S.E. Nichols*, 284 NLRB at 581-82. Noah's Ark, on the other hand, took pains to avoid such a conflict in this case. The Board also relies on the NLRB's decision in *Florida Steel Corp.*, 233 NLRB 491, 494 (1977)—and while that decision supports the Board's argument, the Board neglected to mention that the First Circuit refused to enforce it. *See Florida Steel Corp. v. NLRB*, 587 F.2d 735 (1st Cir. 1979).

Indeed, the Court of Appeals specifically found that the employer's letter offering to help employees find legal counsel before speaking to a Board agent "show[ed] no tendency to interfere with, restrain, or coerce the employees, nor does the record show in any manner that the General Counsel's investigation or presentation of his case was hampered nor made more difficult as a result of this letter." *Id.* at 753; *accord NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 944 (3d Cir. 1980).

The same is largely true here. The Court does have misgivings about the way in which some employees reported being sent to speak to counsel. . . nor does the Court believe that Noah's Ark retained Kutak Rock to advise its employees out of a sincere and unadulterated eleemosynary concern for their wellbeing. Surely, Noah's Ark was self-interested, at least to some extent. But there's also nothing in the record to suggest that Kutak Rock's attorneys didn't fulfill their ethical obligation to represent the interests of the employees, rather than Noah's Ark. *See* filing 18-3 at 15. Nor does the Board identify any way in which its investigation was actually obstructed.

The Board also suggests that Noah's Ark "subsequently interrogated employees about their interviews with the Board by questioning them about the subject matters discussed." Filing 13 at 6. But the evidence is more benign: "employees" actually means "employee," and that employee reported that the day after his interview, he was at his workstation when a manager asked him "what the Feds had asked [him]." Filing 15 at 59. The employee said, "[a] bunch of dumb stuff," and the manager laughed and left. Filing 15 at 60. They repeated the conversation the next day. Filing 15 at 60. That conduct was almost certainly inappropriate—and, it might even be enough to sustain a finding by the Administrative Law Judge that the employee questioned was interfered with, restrained, or coerced in violation of § 8(a)(1). *See generally*

Tschiggfrie Props., Ltd., 896 F.3d at 887-88. But this Court, as the factfinder in this case, is not persuaded that the encounter was that consequential. Accordingly, the Court is not convinced that Noah's Ark violated § 8(a)(1) with its conduct surrounding the NLRB investigation.

(v) Section 8(a)(1) — Conclusion

In sum, the Court is not persuaded that the Board is likely to succeed on its claims that Noah's Ark violated § 8(a)(1) by providing forms for revoking the dues checkoff, or by providing counsel for employees subpoenaed by the Board. But the Court is persuaded that the Board is likely to succeed on its claims that Noah's Ark's numerous anti-Union statements to employees, and the termination of employees engaged in concerted activity protected by § 7, were violations of § 8(a)(1).

(b) Section 8(a)(5)

It's an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. § 8(a)(5). The Board makes a very convincing case that Noah's Ark violated that rule in a number of different ways. Filing 13 at 6-10.

(i) Refusal to Furnish Information

To begin with, the Board contends that Noah's Ark violated § 8(a)(5) by contumaciously refusing to provide the Union with information about its bargaining unit employees. Filing 13 at 6-7. When requested, an employer must provide a union with information that is necessary and relevant to the union's role as the employees' collective bargaining representative. *Hardesty Co.*, 308 F.3d at 863 (citing *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967)). The employer's duty to produce information sought by a union turns

on the likelihood that the request, if granted, would produce necessary and relevant information. *Id.* at 863-64. And the relevance of information to a union's role as a collective bargaining representative is determined on a broad, "discovery-type standard." *Id.* at 863 (citing *Acme Indus. Co.*, 385 U.S. at 437)).

Given that "liberal standard," *see id.*, it's not surprising that Noah's Ark does not even attempt to defend its conduct in this regard, *see generally* filing 19. It's also hard to separate this issue from the substantial evidence in the record that employees were coerced or even tricked into signing "nondisclosure forms" which were obviously intended to frustrate the Union's requests for information. The Board is likely to succeed on this claim.

(ii) Unilateral Wage Changes

The evidence is also undisputed that Noah's Ark unilaterally raised employee wages, during the course of collective bargaining (or at least what should have been collective bargaining). That might seem harmless, but it's a violation of the employer's duty to bargain in good faith to unilaterally change the conditions of employment presently under negotiation. *Hardesty Co.*, 308 F.3d at 864. "Such action by the employer is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Id.* (quotation omitted). As the Eighth Circuit has explained,

> [o]n the one hand, § 8(a)(5) forbids an employer from making unilateral changes in the conditions of employment in order to preserve the status quo. Intuitively, if the employer engages in unilateral action, there may be nothing left for the parties to negotiate about and § 8(a)(5) would thus be violated. On the other hand, § 8(a)(5)'s prohibition is also literal. Section 8(a)(5) makes it illegal for an employer to refuse to bargain collectively with the

> representatives of his employees. Quite simply, the employer must bargain with the union about changes it wishes to make.

Id. at 865. Accordingly, as the Supreme Court has said,

> [u]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance.

NLRB v. Katz, 369 U.S. 736, 747 (1962); *accord Hardesty Co.*, 308 F.3d 865. And perhaps most relevant in this case, given Noah's Ark's other behavior, "[s]uch unilateral action will also often send the message to the employees that their union is ineffectual, impotent, and unable to effectively represent them." *Hardesty Co.*, 308 F.3d at 865.

Noah's Ark clearly made unilateral changes to employee wages, which are generally in the heartland of issues subject to collective bargaining. And Noah's Ark hasn't defended that conduct. *See* filing 19. Obviously, the Board is likely to succeed on this claim.

(iii) Bad Faith Bargaining

It is well established that under the NLRA, an employer is under a duty to enter into sincere, good faith negotiations with the constituted representative of the employees, with an intent to settle the differences and arrive at an agreement. *Id.* at 866. The Board contends that Noah's Ark failed in that duty. Filing 13 at 7-9. Noah's Ark counters that it met with the Union

"approximately twenty times," and insists that the parties were just "unable to come to an agreement on any of the important issues. . . ." Filing 19 at 4.

It is true that the obligation to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession. *Id*. at 865. While the NLRA requires an employer and a union to bargain in good faith, it does not require them to reach agreement. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986).

But when determining whether an employer failed to bargain in good faith, the Court examines the employer's conduct in the totality of the circumstances in which the bargaining took place. *Hardesty Co.*, 308 F.3d at 865. And "where an employer conducts negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement[,] that employer violates § 8(a)(5) by engaging in surface bargaining." *Id*.

It's hard to imagine a clearer example of surface bargaining than the one evidenced by the record in this case. Even setting aside the other anti-Union statements made by Noah's Ark's management, the course of "bargaining" alone almost conclusively demonstrates a refusal to bargain in good faith. The "approximately twenty" meetings relied upon by Noah's Ark, *see* filing 19 at 4, mean little when Noah's Ark only participated in those meetings by sending a representative without authority to bargain, whose function was to receive the Union's proposals and transmit them to management to be summarily rejected. Unilateral implementation of wage increases *greater* than those offered the Union (because none *were* offered) is also indicative of bad faith, "for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union." *Katz*, 369 U.S. at 745; *see NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949).

And that's just *if* the Court sets aside Noah's Ark's other anti-Union statements—which, of course, isn't required. *Hardesty Co.*, 308 F.3d at 865. Instead, it's appropriate to "consider[] these statements in conjunction with the Company's regressive and largely unexplained bargaining behavior"—in which context, combined with Noah's Ark's other conduct, those statements "shed light on what might otherwise merely be hard bargaining and isolated § 8(a)(1) violations." *Id*. at 868.

In sum, both Noah's Ark's evident anti-Union animus and the otherwise-inexplicable course of negotiations demonstrate a refusal to bargain in good faith. The Board is likely to succeed on this claim.

(iv) Premature Declaration of Impasse

Finally, the Board contends that Noah's Ark violated § 8(a)(5) by prematurely declaring an impasse and imposing its "Best and Final Proposal." Filing 13 at 9-10. Noah's Ark responds by insisting that the parties were, in fact, at an impasse. *See* filing 19 at 14.

An employer violates sections 8(a)(1) and (a)(5) of the NLRA when the employer makes a unilateral change in a term or condition of employment without first bargaining to an impasse on that term. *NLRB v. Whitesell Corp.*, 638 F.3d 883, 890 (8th Cir. 2011) (citing *Katz*, 369 U.S. at 743).

> An impasse occurs when good faith negotiations have exhausted the prospects of concluding an agreement, leading both parties to believe that they are at the end of their rope. Whether the parties have reached this point is a case-specific inquiry; there is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations. Among the factors that the NLRB considers in evaluating the existence of an impasse are the

> bargaining history, the good faith of the parties in negotiation, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations.

Id. at 890 (cleaned up).

Given the Court's discussion of Noah's Ark's failure to negotiate in good faith, it should be evident that the Court is also unpersuaded the parties were really at an impasse. An impasse presupposes a reasonable effort at good faith bargaining. *Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1180 (10th Cir. 2003); *NLRB v. Triple A Fire Prot., Inc.*, 136 F.3d 727, 738 (11th Cir. 1998); *see Whitesell Corp.*, 638 F.3d at 892-93. Having refused to bargain in good faith, Noah's Ark could hardly conclude that actually bargaining in good faith would be futile.

Furthermore, before the parties reach an impasse in negotiations, employers are obligated to maintain the status quo as to wages and working conditions. *See Powell v. Nat'l Football League*, 930 F.2d 1293, 1300 (8th Cir. 1989). Noah's Ark didn't. And even had the parties bargained to an impasse, that would only have permitted Noah's Ark to make unilateral changes consistent with offers the Union had rejected. *United Paperworkers Int'l Union, AFL-CIO, Local 274 v. Champion Int'l Corp.*, 81 F.3d 798, 802 (8th Cir. 1996). But here, Noah's Ark simply deemed its "final" offer rejected, despite not having set a deadline for acceptance or received an actual notice of rejection from the Union. Furthermore, the duty to collectively bargain survives an impasse—employers must stand ready to resume bargaining. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996). Noah's Ark indicated no such readiness. *See* filing 18-4 at 84, 117. Noah's Ark's failure to follow the rules

applicable to a valid impasse is also suggestive of bad faith in declaring an impasse in the first place.

In sum, the Board is also likely to succeed on its claim that Noah's Ark violated § 8(a)(5) by prematurely declaring an impasse in negotiations.

(v) Section 8(a)(5) — Conclusion

In sum, the Court is persuaded that the Board is likely to succeed on its claims that Noah's Ark violated § 8(a)(5) by refusing to provide the Union with necessary and relevant information, imposing unilateral wage changes, refusing to bargain in good faith, and prematurely declaring an impasse.

3. REMAINING *DATAPHASE* FACTORS

The remaining factors to be considered in assessing the propriety of injunctive relief—the balance of harms and the public interest—also weigh in favor of a preliminary injunction. The harm to the Union has already been discussed, and Noah's Ark has not identified any harm to itself that would result from an injunction. *See* filing 19. Finally, the public interest in this case is best found in the public policy represented by the NLRA, and will be vindicated by injunctive relief.

Based on all the relevant factors, as discussed above, the Court concludes that preliminary injunctive relief is appropriate. What remains to be considered is the appropriate scope of that relief.

4. SCOPE OF INJUNCTION

The Board has provided the Court with a proposed order setting forth, in detail, the injunctive relief the Board believes appropriate. The Court has reviewed that proposal carefully, in light of its own findings regarding the need for injunctive relief in this case and the Board's likelihood of success on the

merits, and aware of its obligation to award only the relief "necessary either to preserve the status quo or to prevent frustration of the basic remedial purpose of the [NLRA]." *Sharp*, 172 F.3d at 1039; *see McKinney*, 786 F.3d at 1125. With that in mind, the Court orders the following:[6]

1. Noah's Ark shall not:
   a. Tell employees there is no union in the facility;
   b. Tell employees Noah's Ark is going to remove the Union from the facility;
   c. Tell employees that going forward there will be no union in the facility;
   d. Tell employees there will be no raise in wages because of the Union;
   e. Threaten to call the police on employees because the employees engaged in protected, concerted activities related to their terms and conditions of employment;
   f. Threaten to fire employees for engaging in protected, concerted activities related to their terms and conditions of employment;
   g. Fire employees for engaging in protected, concerted activities related to their terms and conditions of employment;
   h. Coerce employees into signing confidentiality forms;
   i. Refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of the following employees concerning rates of pay, wages, hours of work, and other terms and conditions of employment: All production, maintenance,

[6] Unless otherwise specified, any obligation imposed on "Noah's Ark" by this order shall extend to the respondent and its officers, agents, servants, employees, attorneys, and any persons acting in concert or participation with it or them.

shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors as defined in the NLRA;

j. Directly deal with employees regarding terms and conditions of employment;

k. Refuse to provide the Union with information originally requested on November 6, 2017, or any information that is necessary and relevant to its role as the exclusive representative of the employees of the bargaining unit;

l. Unilaterally change bargaining unit employees' wage rates without bargaining with the Union;

m. Engage in bad faith bargaining with the Union for the purpose of negotiating a successor CBA;

n. Engage in conduct intended to undermine the Union's bargaining representative status;

o. Implement a last, best and final offer absent agreement or good-faith impasse; or

p. Engage in conduct which, in any manner, interferes with rights under § 7 of the NLRA.

2. Noah's Ark shall, pending final NLRB adjudication:

a. On or before May 17, 2019, offer immediate reinstatement, in writing, to each employee fired on or about March 27, 2018 for his or her protected concerted activity, as described in § II(2)(a)(ii) of this order—or, only if the position no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges previously enjoyed;

b. On or before May 17, 2019, expunge all references to the discharges from those fired employees' files, and not rely on them in any future adverse employment actions;

c. On or before May 17, 2019, furnish the Union with the information it requested on November 6, 2017, as well as a list of all current bargaining unit employees' names and contact information;

d. Upon the Union's request, bargain in good faith with the Union on a schedule providing for good-faith bargaining for not less than 24 hours per month and not less than 6 hours per session, or on another schedule to which Noah's Ark and the Union have mutually agreed, and appoint a representative to this bargaining with the authority to bargain, until the parties reach a complete CBA or a good-faith impasse in negotiations.

e. Provide the Union with advance notice and an opportunity to bargain over any intended changes to employees' wages, hours, and other terms and conditions of employment;

f. At the Union's election, rescind any or all of the unlawful unilateral changes to the employees' terms and conditions of employment, including any implemented pursuant to Noah's Ark's "Best and Final Proposal";

g. On or before May 17, 2019, post copies of this order in all locations where other notices to employees are customarily posted, and maintain such postings free from all obstructions and defacements pending conclusion of the Board's administrative proceeding;

h. On or before May 31, 2019, file with the Court, and serve upon the Regional Director of Region 14 of the Board, a sworn affidavit from a responsible official of Noah's Ark setting forth with specificity the manner in which it has complied with this order, including the location or locations in which copies of this order were posted.

5. MOTION FOR ORAL ARGUMENT

The Court carefully considered the Board's motion for oral argument (filing 20). But due to circumstances beyond the Court's control, the undersigned's availability has been limited since the Board's petition was ripe, and the Court's upcoming calendar is extremely crowded (due in no small part to the three jury trials the Court has scheduled during the next four weeks). As a result, trying to schedule an oral argument would have substantially delayed the Court's disposition of this case—which seems at odds with the purpose of the Board's petition. Accordingly, the Court will deny the Board's request for argument.

III. CONCLUSION

For the foregoing reasons, the Court will grant the Board's "Motion for Hearing on Affidavits" (filing 4), which the Court has construed a motion for injunctive relief consistent with the Board's petition (filing 1). *See* filing 6. One final note: because this memorandum and order is fully dispositive of the petition (which requested only interim relief), the Court will close this case for administrative purposes. That does not, of course, preclude the Court from exercising its full authority to assure compliance with this order. The Court will also order the Board to regularly report to the Court on the status of the

administrative proceedings, and the Court will enter a final judgment when the NLRB proceedings are concluded.

IT IS ORDERED:

1. The Board's motion for hearing on affidavits (filing 4) is granted.

2. The Board's motion for oral argument (filing 20) is denied.

3. Noah's Ark is preliminarily enjoined as set forth more fully in this memorandum and order.

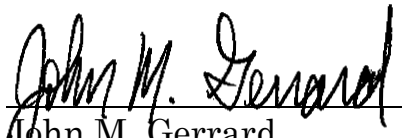
4. This case is closed for administrative purposes.

5. On or before August 8, 2019, and each 90 days thereafter, the Board shall file a brief status report indicating whether the administrative proceedings are ongoing.

6. The Clerk of the Court shall set a status report deadline for August 8, 2019.

Dated this 10th day of May, 2019.

BY THE COURT:



John M. Gerrard
Chief United States District Judge

From: Morgan Lewis News
To: Ring, John
Subject: Now Playing: Workplace Investigations and Weingarten Rights: A Cautionary Tale – Labor & Employment NOW
Date: Tuesday, May 7, 2019 5:05:51 PM

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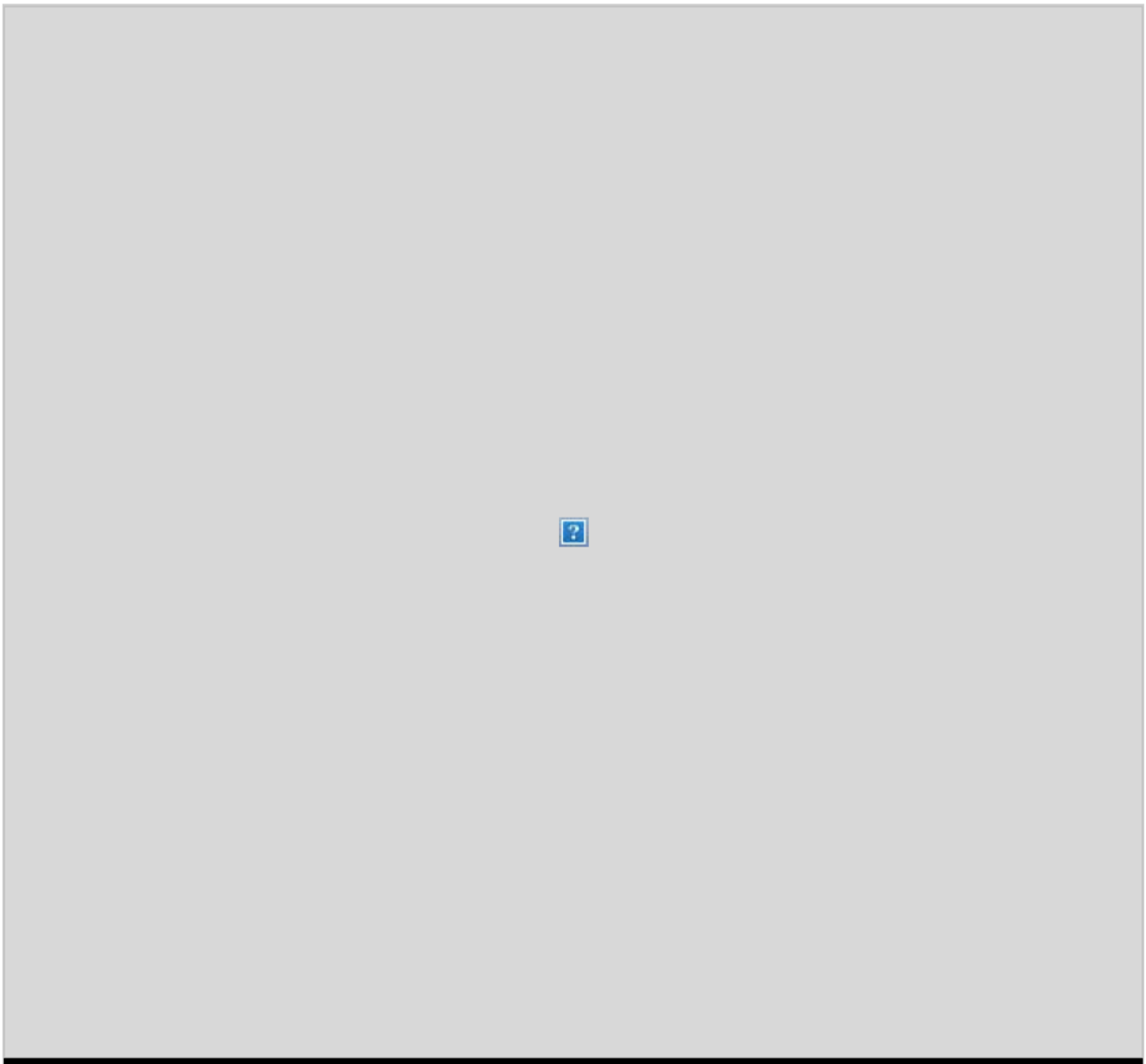

Former NLRB member **Harry Johnson** discusses *Weingarten* rights—the rights of union-represented employees to have a representative present during workplace investigation interviews. Analyzing the NLRB's decision in *PAE Applied Technologies, LLC*, Harry breaks down the Board's guidance on what an employer can and cannot do in questioning during an interview and in discipline related to a verbal altercation with a customer. He also highlights NLRB guidance on employer rules related to

communication with customers.

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From:	Shorter, LaDonna
To:	Murphy, Paul; Psotka, Jonathan; Bashford, Jo Ann; Bridge, Diane L.; Bush, Lynn; Carlton, Peter J.; Colwell, John F.; Dodds, Amy L.; Emanuel, William; Ford, Christina; Free, Douglas; Habenstreit, David; Jacob, Chris W; Jacob, Fred; Kaplan, Marvin E.; Kelly, David A.; Krafts, Andrew J.; Lennie, Rachel G.; Lesesne, Katherine; Lucy, Christine B.; Lussier, Richard; McFerran, Lauren; Merberg, Elinor; Meyers, Mary; Murphy, James R.; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Shorter, LaDonna; Sophir, Jayme; Stock, Alice B.; Tursell, Beth; Vazquez, Laura T.; Zick, Lara S.
Subject:	NSL Country Gardens, LLC, 01-CA-223025 - Section 10(j) results
Date:	Friday, May 17, 2019 12:28:12 PM
Attachments:	ILB.internalresults.1-CA-223025.NSL.docx NSL Country Gardens 10(j) Decision 5-10-19.pdf NSL Country Gardens Inj Order 5-16-19.pdf

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On January 11, 2019, the Board authorized the institution of Section 10(j) proceedings in this case involving, among other things, the Employer's unlawful assistance with a decertification petition, withdrawal of recognition, and discharge of two union activists. The Region was directed to seek, among other things, an interim bargaining order, interim reinstatement of the two discriminatees, and a cease and desist order.

By decision of May 10, 2019, and supplemental order of May 16, 2019 (both attached), the District Court of Massachusetts granted most of the injunctive relief requested, including an order to recognize and bargain with the incumbent Union, reinstate one of the employees, and to cease and desist from the alleged violations. The court did not order the Employer to offer interim reinstatement to the other discharged employee, who had stated that she would not accept interim reinstatement at this time.

UNITED STATES GOVERNMENT

memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: May 17, 2019

TO: Peter B. Robb
General Counsel

FROM: Jayme L. Sophir
Associate General Counsel

SUBJECT: NSL Country Gardens, LLC
Case 1-CA-223025 et al.

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/s/
J.L.S.

Attachments

cc: The Board
Solicitor's Office
Executive Secretary
Operations Management

H:injlit/10j/ILB.internalresults.1-CA-223025.NSL

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 19-cv-10145-RGS

PAUL J. MURPHY, Acting Regional Director,
Region 01, National Labor Relations Board, for and on
Behalf of the NATIONAL LABOR RELATIONS BOARD

v.

NSL COUNTRY GARDENS, LLC

MEMORANDUM AND ORDER ON PETITIONER'S
PETITION FOR TEMPORARY INJUNCTION
UNDER SECTION 10(j) OF NATIONAL LABOR RELATIONS ACT

May 10, 2019

STEARNS, D. J.

The National Labor Relations Board (NLRB or Board) brought this petition seeking a preliminary injunction pursuant to section 10(j) (29 U.S.C. § 160(j)) of the National Labor Relations Act (NLRA). The NLRB asks the court to compel NSL Country Gardens, LLC (NSL), to reinstate two members of the New England Healthcare Employees Union 1199, who also served as Union delegates. The NLRB claims that these former employees were discharged in retaliation for their union activities and that NSL's "for cause" justification for their firing is pretextual. The NLRB further asks the court to reinstate the collective bargaining agreement (CBA) from which NSL withdrew its recognition despite "continued majority employee support."

See Reply at 4; Pet. at 11. The motion for injunctive relief is before the court based on an administrative record that closed on April 26, 2019.[1] *See* Dkt # 20. The court heard argument from the parties on May 8, 2019.

The factual background as gleaned from the record is as follows. NSL operates a residential healthcare facility in Swansea, Massachusetts. On July 3, 2016, NSL recognized the Union as the exclusive collective bargaining agent for the following two groups of employees, referred to as Unit A and Unit B. Unit A consisted of

> [a]ll full-time and regular part-time Registered Nurses; excluding all other Employees, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, other Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.

Unit B was comprised of

> [a]ll full-time and regular part-time Licensed Practical Nurses, Nurses' Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees, and Laundry Employees; excluding all other Employees, Registered Nurses, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees,

[1] The NLRB's administrative hearings began on December 11, 2018, before Administrative Law Judge Geoffrey Carter. Hearings were held on December 12 and 13, 2018, and over fourteen days between February 4, 2019, and the closing date of April 26, 2019.

> Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.

As negotiated, the CBA was to be in effect from November 1, 2016, through October 31, 2018.

On July 6, 2018, NSL withdrew from the CBA after an apparent majority of the nursing home's employees signed a petition demanding that the Union be ousted "immediately." On July 9, 2018, NSL suspended Union delegate-employee Stephanie Sullivan, and, on July 11, 2018, discharged her, allegedly for leaving her work area on an unassigned break to solicit another employee on behalf of the Union. GC-SS1; Tr. 707. On July 16, 2018, NSL suspended delegate-employee Karen Hirst, and three days later terminated her for allegedly failing to report a patient-on-patient altercation. Tr. at 831; GC 61(e)-(f). After an investigation, the NLRB charged NSL with terminating Sullivan and Hirst for their steadfastness in support of the Union and as a warning to other employees who might be similarly inclined.

The issues presented by the Petition are: (1) whether there is reasonable cause to believe that NSL violated the NLRA when it withdrew recognition from the Union and discharged Sullivan and Hirst; and (2) whether interim injunctive relief is "just and proper." *Pye on Behalf of N.L.R.B. v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994). Section 10(j) of the NLRA provides that a Regional Director may petition a

federal district court for interim injunctive relief pending the NLRB's final resolution of an alleged unfair labor practice. *See McDermott ex rel. NLRB v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010). In considering a petition for interim relief under section 10(j), a district court's role is narrowly circumscribed. It "must limit its inquiry to whether (1) the Board has shown reasonable cause to believe that the defendant has committed the unlawful labor practices alleged and (2) whether injunctive relief is, in the words of the statute, 'just and proper.'" *Sullivan Bros. Printers, Inc.*, 38 F.3d at 63. "In assessing whether the Board has shown reasonable cause, the district court need only find that the Board's position is 'fairly supported by the evidence.'" *Id.*, quoting *Asseo v. Centro Medico del Turabo*, 900 F.2d 445, 450 (1st Cir. 1990) (noting that the issue is whether the NLRB's theory of a violation is substantial and not frivolous). The Board need not at the injunctive stage definitively prove that the alleged act constitutes an unfair labor practice; rather, the prayer should be granted unless the NLRB's legal or factual theories are "fatally flawed." *Silverman ex rel. NLRB v. Major League Baseball Player Relations*, 67 F.3d 1054, 1059 (2d Cir. 1995). The court should not attempt to resolve contested issues of fact, and rather defer to the Board's characterization of the facts so long as it is "within the range

of rationality." *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995).

At the second step of the inquiry, in deciding whether to grant injunctive relief,

> the Board faces a much higher hurdle, for here the district court must examine "the whole panoply of discretionary issues with respect to granting preliminary relief." Thus, the district court must apply the familiar, four-part test for granting preliminary relief. Under this test, the Board must demonstrate:
>
> > (1) A likelihood of success on the merits; (2) The potential for irreparable injury in the absence of relief; (3) That such injury outweighs any harm preliminary relief would inflict on the defendant; and (4) That preliminary relief is in the public interest.
>
> When . . . the interim relief sought by the Board "is essentially the final relief sought, the likelihood of success should be *strong*."

Sullivan Bros. Printers, Inc., 38 F.3d at 63 (citations omitted and emphasis in original). Courts in this Circuit have customarily recognized the unlawful withdrawal of union recognition and the retaliatory termination of union employees as unfair labor practices for which §10(j) interim injunctive relief is appropriate. *See, e.g., Centro Medico*, 900 F.2d at 454-455; *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, at 26-27; *Pye ex rel NLRB v. YWCA of Western Massachusetts*, 419 F. Supp 2d 20, 22-23 (D. Mass. 2006); *Walsh v. Liberty Bakery Kitchen, Inc.*, 2017 WL 2837006, at *1 (D. Mass. June 30, 2017).

NSL, for its part, maintains that too many relevant considerations are "unexplored or insufficiently explored in the administrative record" to warrant the granting of section 10(j) relief. Opp'n at 4. It cites a number of mostly generic concerns: (1) the potentially adverse impact on employee morale in reinstating employees otherwise properly dismissed, *see* G*arcia v. High Flying Foods*, 2015 WL 773054, *20 (S.D. Cal. Feb. 12, 2015); (2) whether the discharged employees have secured alternative employment or desire to return to their former jobs, *see, e.g., McDermott v. Ampersand Publ'g LLC*, 2008 WL 8628728, at *13 (C.D. Cal. May 22, 2008); (3) whether the terminations have adversely impacted the willingness of the remaining employees to seek union representation, *see NLRB v. Prime Healthcare Servs.*, 2017 WL 2192970, at *5 (D. Nev. May 18, 2017); (4) whether the terminations have chilled the willingness of the remaining employees to file charges with the Board, *see NLRB v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 210 (7th Cir. 1989); (5) whether an order of reinstatement would result in the layoff of existing employees, *see McDermott*, 2008 WL 8628728, at *14; and (6) whether there has been any diminishing of the wages and benefits of existing employees attributable to the termination of the CBA, *see Osthus v. TruStone Fin. Fed. Credit Union*, 182 F. Supp. 3d 901, 913-914 (D. Minn. 2016). NSL also cites *McKinney v. Creative Vision Res., LLC*, 783 F.3d 293,

299 (5th Cir. 2015) ("[F]or purposes of § 10(j), a labor practice must lead to exceptional injury, as measured against other unfair labor practices" and "a district court . . . must issue specific findings of fact that suggest harm requiring § 10(j) injunctive relief.").[2]

This latter observation may be a bit of an overstatement. In this Circuit, the law places rather strict limits on the ability of a district court to make differential fact-finding decisions in a section 10(j) context. Rather, it must accept the Board's characterization of the facts so long as they fall "within the range of rationality." *Rivera-Vega*, 70 F.3d at 158. While this may be an instance of excessive *Chevron* deference, it is not for a district court to defy the governing standard.

Turning to the load-bearing wall of injunctive relief, I am satisfied that that there is substantial evidence in the administrative record to support the NLRB's finding of an unfair labor practice. Accepting the NLRB's factual characterizations as I must, the record portrays a not-so-subtle effort by NSL's Administrator, Jamie Belezarian, to instigate and abet a campaign by

[2] The NLRB represents that it advised NSL on April 17, 2019, that it could avail itself of the opportunity to present contrary "just and proper" evidence during the final three days of the administrative hearing in advance of this court's May 8 hearing but that NSL "inexplicably . . . failed to do so." Reply, at 2 n.3, citing *South Jersey Sanitation Corp.*, 2011 WL 5868413, at *1 n.1 (N.L.R.B. March 7, 2011).

April Birch, an anti-Union employee, to persuade fellow employees to decertify the Union. In addition to permitting Birch to collect signatures on a decertification petition during work hours and in work areas, Belezarian (to cite a few of the many instances in the administrative record) recruited other NSL managers to support Birch's petition drive, including then-Staff Development Coordinator Cassandra Sousa, then-Director of Nursing Heather Perry, then-Minimum Data Set (MDS) Coordinator Mallory O'Kane, then-Assistant Director of Nursing Katherine Minyo, and Nurse Supervisor Samantha Logan. *See* Tr. 83, 84-86, 155, 746-747, 810-813, 1490. Belezarian regularly complained that the Union was an impediment to retaining staff and managing the nursing home, that she wanted the Union out because it was "a thorn in her side," and that she had "ways" to accomplish that goal. Tr. 241-246, 297, 303-304, 313, 330, 356.

The timing and circumstances of the suspensions and terminations of Sullivan and Hirst, both of whom were long-time (30 plus years) employees at the home, are also suspect. While Birch was circulating the decertification petition, Sullivan made no secret of her support of the Union, extolling the benefits of union representation, handing out supporter buttons, and initiating a pro-Union counter-petition. GC 30; Tr. 673, 724, 748-749. Shortly after Belezarian confronted an employee wearing one of Sullivan's

Union buttons, Tr. 675, 815, she and Joe Veno, NSL's Vice President of Operations, called Sullivan into Belezarian's office. Tr. 705-706. They accused Sullivan of an unauthorized absence from her workstation and told her that she was being suspended pending an investigation. Tr. 707-708, 889.[3] Despite her vehement denials of the accusation, she was dismissed two days later. Tr. 720-722.

Like Sullivan, Hirst worked at NSL for more than 30 years. Tr. 942. She was also a long-time delegate for the Union. Upon learning of the decertification petition, and despite being on vacation, Hirst messaged several of her coworkers to voice her support for the Union. Tr. 960-965; GC KH-1. Within minutes of sending the message, Hirst was informed that Belezarian was displeased with her sending pro-Union messages to employees. Tr. 965. Believing that Stacy Hayes, Belezarian's sister-in-law, had shared the messages with her, Hirst sent Hayes a mouse emoji. A few days later, Veno charged Hirst with a failure to report an incident involving a patient altercation which she had testified she had not seen or known about. At least one employee was fired for her refusal to participate in

[3] Sullivan was issued a Disciplinary Action Report, which stated, "Solicitation & Distribution: Leaving work area on unassigned break to solicit another employee while the other employee also was not on an assigned break in a resident area (Dining Room)." GC-SS 1; Tr. 707.

management's "case against Karen . . . in order to terminate her." Tr. 833. Hayes and Activities Assistant Ariana Federici-McCarthy were asked by Belezarian to revise their statements to add that Hirst had observed the incident and that they had asked her to report it. Tr. 799. Despite the fact that three other employees initially wrote statements supporting Hirst's account of the incident, Tr. 799, 801-802, 831-832; GC 61(b)-(d) and (g)-(h), 840-841, she was terminated a few days later.

The remaining three injunctive factors also favor the Board. The prospect of irreparable harm to the Union from its enforced absence from the workplace is plain. As the First Circuit observed in a similar case, "there was a very real danger that if [the employer] continued to withhold recognition from the Union, employee support would erode to such an extent that the Union could no longer represent those employees. At that point, any final remedy which the Board could impose would be ineffective." *Centro Medico*, 900 F.2d at 454.[4] In this latter vein, there is evidence in the record supporting the Board's assertion that NSL "employees have suffered – and continue to suffer – the loss of just cause discipline protections, a grievance

[4] In another similar case, the Seventh Circuit recognized that "[a]s time passes, the benefits of unionization are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable." *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996).

arbitration procedure, and health and safety protections, none of which can [be] remedied by a Board order in due course." Reply at 7. The harm to Sullivan and Hirst of having been summarily booted out of a life-long vocation is also plain. The balance of the hardships favors the Union because in the absence of injunctive relief, NSL will benefit from its unfair labor practices while the Union is forced to wait for reinstatement in an increasingly oppositional environment. Nor is an order to return to the bargaining table a satisfactory form of substitute relief. "[W]hen the [employer] is not compelled to do anything except bargain in good faith, the risk from a bargaining order is minimal." *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1196 (9th Cir. 2011). The employer is not required "to do anything that would cause it harm; it need do nothing more than follow the ordinary obligations of an employer under the law." *Id.*

Finally, the public interest is served by injunctive relief in the sense that society, through Congress, has embraced the aims of the NLRA as furthering the goal of a just society. *Pan Am. Grain Co.*, 805 F.2d at 28.

ORDER

For the foregoing reasons, the petition for injunctive relief will be granted. The NLRB will submit as soon as practicable a proposed form of injunctive order for the court's approval, together with the affidavits of Sullivan and Hirst indicating whether they desire to be reinstated to their former positions at NSL.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 19-cv-10145-RGS

PAUL J. MURPHY, Acting Regional Director, Region 01, National Labor Relations Board, for and on Behalf of the NATIONAL LABOR RELATIONS BOARD

v.

NSL COUNTRY GARDENS, LLC

SUPPLEMENTAL ORDER ON
PETITION FOR TEMPORARY INJUNCTION
UNDER SECTION 10(j) OF NATIONAL LABOR RELATIONS ACT

May 16, 2019

STEARNS, D. J.

The National Labor Relations Board (NLRB or Board) petitioned the court for a preliminary injunction pursuant to section 10(j) (29 U.S.C. § 160(j)) of the National Labor Relations Act (NLRA) to compel Respondent NSL Country Gardens, LLC (NSL), pending the NLRB's final disposition of NSL's matter before it, to negotiate in good faith a collective bargaining agreement (CBA) and to reinstate two members of the New England Healthcare Employees Union 1199, who also served as Union delegates. In granting the motion, the court asked the NLRB to submit a draft injunction Order. The court adopts the following portions of its proposed form of Order.

IT IS HEREBY ORDERED that, pending the Board's final disposition of this matter, Respondent NSL, its officers, representatives, agents, servants, employees, attorneys, successors, and assigns, and all persons acting in concert or participation with it or them are enjoined and restrained from:

(a) Withdrawing recognition from the Union in the professional unit and the nonprofessional unit, as those units are described in the parties' most recent collective-bargaining agreements (the Units)[1]; failing or refusing to

[1] NSL recognized the Union as the exclusive collective bargaining agent for the following two groups of employees, referred to as Unit A and Unit B. Unit A consisted of

> [a]ll full-time and regular part-time Registered Nurses; excluding all other Employees, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, other Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.

Unit B was comprised of

> [a]ll full-time and regular part-time Licensed Practical Nurses, Nurses' Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees, and Laundry Employees; excluding all other Employees, Registered Nurses, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.

recognize the Union as the exclusive collective-bargaining representative of its employees in the Units, and upon request of the Union, failing or refusing to bargain in good faith over the wages, hours, and other terms or conditions of employment of the employees in the Units;

(b) soliciting or encouraging an employee petition seeking to decertify the Union;

(c) suspending and discharging employees because of their Union activity; and

(d) in any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

IT IS FURTHER ORDERED that, pending the Board's final disposition of this matter, Respondent, its officers, representatives, agents, servants, employees, attorneys, successors, and assigns, and all persons acting in concert or participation with it or them, shall be required to take the following affirmative actions:

(a) Within five (5) days of the issuance of this Order, recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the Units concerning terms

and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement;

(b) Within five (5) days of the issuance of this Order, offer Stephanie Sullivan interim reinstatement to her former positions; or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed, displacing, if necessary, any employee(s) who may have been hired or reassigned to replace them;

(c) Within fourteen (14) days of the issuance of this Order, post copies of the District Court's opinion and order at Respondent's Swansea, Massachusetts facility where notices to employees are customarily posted; said posting shall be maintained during the pendency of the Board's administrative proceedings free from all obstructions and defacements; all unit employees shall have free and unrestricted access to said postings; and

(d) Within twenty (20) days of the issuance of this Order, file with the Court, with a copy submitted to the Regional Director of Region 01 of the Board, a sworn affidavit from a responsible Respondent official, setting forth with specificity the manner in which Respondent has complied with the terms of this decree, including how it has posted the documents required by this Order.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

From: Employment Law360
To: Ring, John
Subject: NY Appeals Panel Puts Farm Worker Union Ban To Pasture
Date: Friday, May 24, 2019 3:41:29 AM

EMPLOYMENT

Friday, May 24, 2019

TOP NEWS

NY Appeals Panel Puts Farm Worker Union Ban To Pasture

A split New York state appeals panel extended labor organizing rights to farm workers on Thursday, saying their exclusion from the 1937 state law empowering workers to form unions violates the state constitution.

Read full article »

Analysis

An Epic Timeline: The Cases That Set The Stage

The Epic Systems case may have captivated Supreme Court watchers in 2018, but the seeds that led to last May's blockbuster decision were sewn by the California Supreme Court and the National Labor Relations Board many years earlier. Here, in the final installment of a four-article series marking the one-year anniversary of the Epic Systems ruling, Law360 follows class waiver law's winding path to the nation's highest court.

Read full article »

Split NLRB OKs Anheuser-Busch Bid To Arbitrate Race Claim

The National Labor Relations Board has ruled 2-1 that Anheuser-Busch LLC can try to force a Teamster-represented former worker's race discrimination claim into arbitration, even though the company's arbitration agreement doesn't cover union members.

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Vague Math Sends Estee Lauder Wage Suit To State Court

A California federal judge kicked back to state court a proposed class action accusing Estee Lauder of stiffing workers by making them work off the clock, taking issue with the company's calculation that there is $70 million at stake in the case.

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NJ Software Co. Must Face Ex-CEO's Whistleblower Claims

A New Jersey federal judge on Thursday ruled that a medical software company must face a former chief executive officer's claims that he was fired for raising concerns about unlawful workplace activity, reasoning it was still unclear if the ex-chief was terminated or voluntarily resigned.

Read full article »

DISCRIMINATION

EEOC Brochure On LGBT Rights Justifies Suit: Church Group

An Equal Employment Opportunity Commission brochure saying Title VII protects gay and transgender workers did enough harm to employers to warrant a lawsuit challenging the agency's take on the federal anti-bias statute, a Texas-based church group said.

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Nurse Asks Justices To Hear Nixed Bias, Whistleblower Fight

A former Johns Hopkins University nurse who claimed the school forced her

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out of her job has asked the U.S. Supreme Court to review a Fourth Circuit decision that signed off on sanctions ending a series of whistleblower and bias suits she launched.

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Woman Says Railroad's Favoritism Of Men Forced Her To Quit

A woman who worked for the Illinois Central Railroad Co. for 17 years has filed a lawsuit in state court claiming the railroad's male-dominated culture allowed less-qualified men to fill numerous positions she wanted and caused her to quit.

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WAGE & HOUR

Horse Racing Co. Must Pay $1.6M For Labor, H-2B Violations

A New York thoroughbred horse racing trainer must part with over $1.6 million after the U.S. Department of Labor discovered that his company had underpaid 150 of its employees, including its migrant workers, in violation of federal labor laws and the H-2B visa program regulations, the DOL said Wednesday.

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LABOR

Telling Worker 'Shut Up' Not Anti-Union Animus, NLRB Says

Electrolux Home Products didn't violate federal labor law when it fired a worker managers told to "shut up" during a captive-audience meeting, the NLRB ruled, concluding that while that treatment may have been rude, it didn't establish union animus.

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NONCOMPETES

House Dem Says DOJ Antitrust 'Prioritizing Side Projects'

The head of the House of Representative's antitrust subcommittee has excoriated the chief of the Department of Justice's Antitrust Division for the DOJ's recently stepped-up amicus program, accusing it of aiding monopolists through court interventions rather than fighting them by bringing enforcement cases.

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WHISTLEBLOWER

Ill. Justices Toss Whistleblower Claim Over College's Hiring

A Chicago-area community college medical program director can’t bring a claim against the school's board under a state whistleblower law because he didn’t show how the school's conduct was illegal, the Illinois Supreme Court held Thursday.

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WORKER SAFETY

Lack Of Evidence Dooms Asbestos Death Suit, Judge Rules

A Washington federal judge has tossed a widow's claims against several companies over her husband's death from mesothelioma, finding that she's presented no evidence linking those products to her husband's illness.

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WORKER PRIVACY

Illinois Workers Fight Bid To Ax Biometrics Suit

A proposed class of workers asked an Illinois federal judge to reject a

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Holland & Knight
Irell & Manella
Jackson Lewis
Jones Davis & Jackson
Katten Muchin
Keker Van Nest & Peters
Kellogg Hansen
Kirkland & Ellis
Knobbe Martens
Lewis Roca
LibbyHoopes
Marshall Dennehey
Michael Best
Miller Firm LLC
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Morgan Lewis
Mound Cotton
Nicolaides Fink
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Norton Rose Fulbright
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COMPANIES

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Apple Inc.
Association of Corporate Counsel
Canadian National Railway Company
Chevron Corp.
Comcast Corp.
Defenders of Wildlife
ESPN Inc.
Electrolux AB
Epic Systems Corp.
Estee Lauder Companies Inc.
Florida Power & Light Co.

software company's bid to dismiss a suit alleging the firm violated the state's biometric privacy law by failing to ask for employees' consent to use their fingerprints as part of a timekeeping system.

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EXPERT ANALYSIS

Trade Secret Protection Is Getting Stronger In China

While some U.S. parties have historically hesitated to pursue trade secret misappropriation remedies in China due to concerns about low potential recoveries, bias in the local judiciaries or the lack of discovery, recent developments change the field of play significantly in these areas, say attorneys with Covington.

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Challenges To Trump's '2 For 1' Order Face Difficult Road

Shortly after President Donald Trump took office, he issued an executive order directing agencies to eliminate two existing regulations for every new regulation adopted. Multiple lawsuits challenging this order are ongoing, but federal courts are poorly equipped to adjudicate claims that involve an agency's failure to regulate, says Steven Gordon of Holland & Knight.

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Keys To Communicating A Law Firm's Mission

Today's law firm leaders are pretty good at developing a strategic vision for the enterprise, but there is often a disconnect between that road map and the marketing department's rank and file, leading to a deliverable that does little to differentiate the firm, says José Cunningham, a legal industry consultant.

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LEGAL INDUSTRY

In-House Counsel Salaries Up 4.4% In 2018, Study Says

In-house counsel in the U.S. saw an average salary bump of 4.4% last year compared to 2017, contributing to "unprecedented rates of compensation satisfaction," according to a study released on Thursday.

Read full article »

Craig Tried To Bar Skadden Attys' Testimony, Opinion Shows

In the months leading up to his indictment, Gregory Craig, the ex-Skadden attorney charged with lying to federal authorities, sparred with both his former firm and prosecutors as he unsuccessfully sought to bar two onetime partners from testifying before a grand jury.

Read full article »

DLA Piper Appoints IP Litigator As Next US Chair

DLA Piper announced Thursday that it has selected the current co-chair of its intellectual property and technology practice to serve a four-year term as the firm's chair in the United States.

Read full article »

Ex-Knobbe Martens, Heim Payne Partners Launch IP Boutique

In the seven years since Congress passed its landmark patent law creating inter partes reviews, some larger litigation firms have struggled to fit their models to the new speedier format. But two veteran patent litigators, formerly with Knobbe Martens and Heim Payne & Chorush LLP, saw that challenge as an opportunity to launch a different kind of intellectual property firm Thursday.

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Nashville Atty, Son Of Bass Berry & Sims Founder, Dies At 108

A 108-year-old attorney who began practicing law during Franklin D.

Google Inc.
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International Brotherhood of Teamsters
International Speedway Corporation
Ironshore Inc.
Johnson & Johnson
Kentucky Derby
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Microsoft Corp.
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GOVERNMENT AGENCIES

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Crow Nation
Equal Employment Opportunity Commission
Executive Office of the President
Federal Trade Commission
Florida Supreme Court
Food and Drug Administration
Illinois Supreme Court
National Labor Relations Board
New York Attorney General's Office
U.S. Army
U.S. Attorney's Office
U.S. Department of Justice
U.S. Department of Labor
U.S. House of Representatives

Roosevelt's first administration and who continued to work in Bass Berry & Sims' offices until recent months has died.

Read full article »

Fla. High Court Adopts Daubert Standard For Evidence

The Florida Supreme Court, with its new conservative majority, did an about-face Thursday and adopted stricter federal standards for the admittance of expert testimony, incorporating a 2013 law requiring the stricter standard one year after rejecting it over concerns it would undermine the right to a jury trial and inhibit access to the courts.

Read full article »

Mass. Judge's Atty Blasts Deal-Offer Leak In ICE Arrest Case

The attorney for a Massachusetts state court judge charged with allowing an unauthorized immigrant to escape U.S. Immigration and Customs Enforcement criticized the federal government Thursday for allegedly leaking that the judge turned down a deal that could have spared her criminal charges.

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IP Firm Hits Back At Colo. Firm's Claims In 'Bold' Name Row

An intellectual property firm has asked a Colorado federal court to throw out a counterclaim filed by a Denver-based firm in a trademark dispute over the use of the word "bold" in the firms' names.

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Law360's Weekly Verdict: Legal Lions & Lambs

WilmerHale nabbed this week's top legal lion honor with a U.S. Supreme Court win in a trademark case for a sports apparel retailer, while Norton Rose Fulbright was among the week's legal lambs as a result of a crushing antitrust defeat in federal court for client Qualcomm.

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Lawyers' Digital Assistants Raise Ethics, Privacy Concerns

As voice-activated digital assistants become more popular, attorneys who use such technology in their offices must keep abreast of evolving standards of reasonable care in protecting confidential client information, say Brenda Dorsett of the New York State Bar Association Professional Ethics Committee and Barry Temkin of Mound Cotton.

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New York, New York

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Gordon & Rees
Wilmington, Delaware

Litigation Associate
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Washington, District of Columbia

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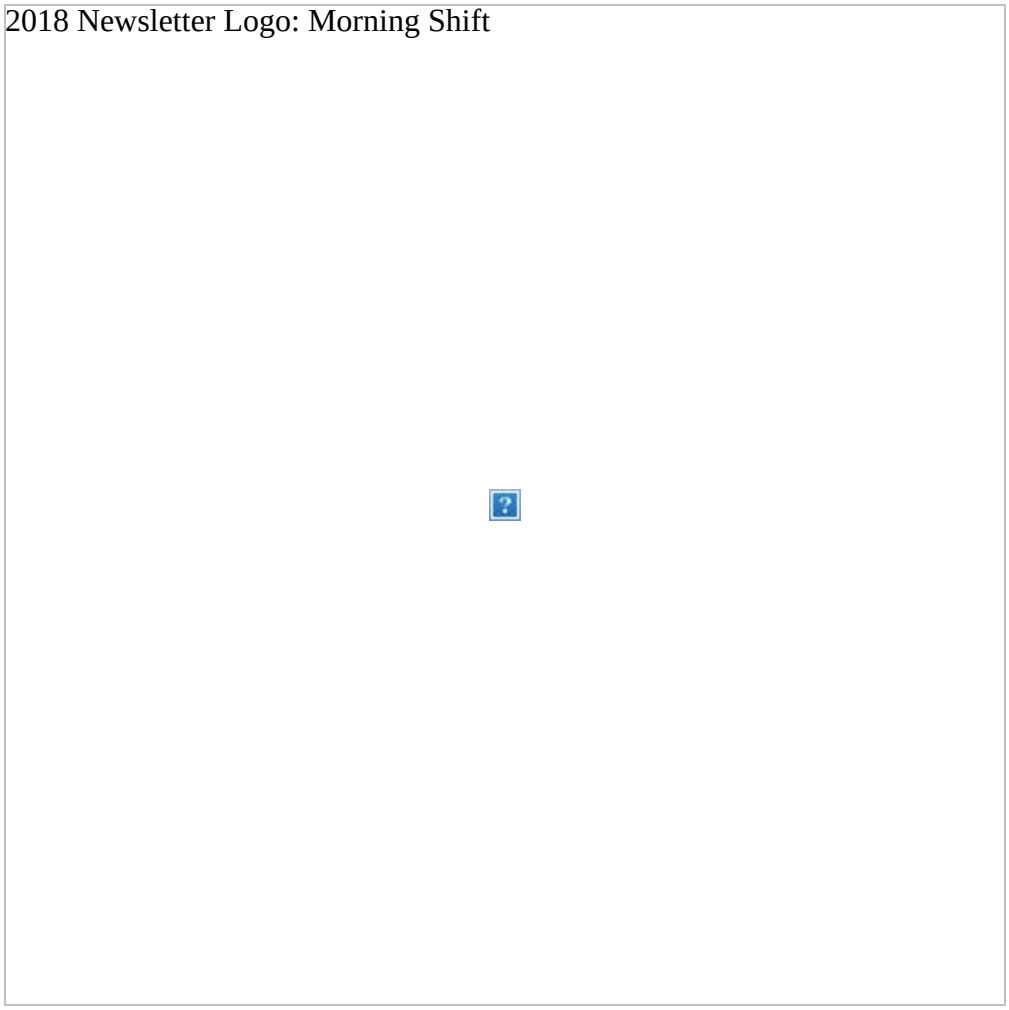
From: POLITICO"s Morning Shift
To: Ring, John
Subject: O' Rourke"s immigration overhaul — Staffing changes at the NLRB — Officials question if Morgan is cut out for ICE
Date: Thursday, May 30, 2019 10:03:20 AM

May 30, 2019 View in browser



BY **REBECCA RAINEY**

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— 2020 hopeful Beto O' Rourke has a plan to overhaul the immigration

system that would address Dreamers and raise visa caps.

— Report: The NLRB is planning staffing changes at its regional offices — including demotions.

— Top immigration officials are questioning whether President Donald Trump's pick to lead ICE is cut out for the job.

GOOD MORNING! It's Thursday, May 30, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

O'ROURKE ROLLS OUT IMMIGRATION PLAN: 2020 Democratic presidential contender Beto O'Rourke on Wednesday proposed a major rewrite of the immigration system that would create a pathway to citizenship for TPS and DACA recipients, remove fees for naturalization and raise visa caps, POLITICO's David Siders reports . The former Texas representative says he would use his presidential authority to halt many Trump administration policies, such as travel bans, family separations and construction of the southern border wall.

The plan proposes increasing immigration court staff, which faces a soaring case backlog. O'Rourke argues that immigration reform "will be critical to unlocking" America's "future success," POLITICO's Quint Forgey writes. "Immigrants driving economic growth, O'Rourke claims, will add $2 billion to state and local tax revenues every year and cut the deficit by at least $1 trillion over the next two decades." Read a breakdown of the proposal from Forgey here.

Sick and tired of traffic? Relief may not be as far off as you think. POLITICO Magazine's "What Works" series looks at innovative ways that cities are trying to reduce traffic, from density-focused light rail to congestion pricing to an outright car ban on the busiest streets. If you could change anything to reduce congestion or improve transportation in your city, what would it be? Tell us here and we'll publish the most thoughtful responses.

NLRB

STAFF CHANGES AT THE NLRB: "The heads of the National Labor Relations Board are planning a restructure of administrative staff at the agency's roughly 26 regional offices, including demoting employees in certain job classifications nationwide," Bloomberg Law's Hassan Kanu reports. "The plan would reclassify almost all NLRB administrative professionals as general 'program support assistants,' and place those employees into the same grade within the government's General Schedule pay system," he writes.

NLRB General Counsel Peter Robb and the agency's career staff have been at odds since January 2018, when Robb proposed restructuring the agency to demote regional dire ctors, whom the business lobby considers too pro-union. More from Bloomberg Law here.

Other labor headlines: "Union vote scheduled at VW Chattanooga plant," from POLITICO's Rebecca Rainey.

AROUND THE AGENCIES

TRUMP STRUGGLES TO FILL IMMIGRATION POSTS: "Trump has purged several of his top immigration officials in recent months, saying he wanted to go in a 'tougher direction,'" POLITICO's Gabby Orr and Daniel Lippman report. "But filling those positions with uniformly lauded candidates has proved difficult."

They report that 16 current and former officials expressed doubt that the president's choice to lead ICE, Mark Morgan, who started as acting director on Tuesday, "is a genuine immigration hardliner" or "understands the complexities of domestic immigration enforcement." Morgan also never won over Brandon Judd, president of a union for Border Patrol agents.

Despite Morgan's recent appearances praising the president's immigration policies on Fox News, three people familiar with the process told Orr and Lippman that Morgan was chosen, "in part, because Trump had exhausted his other options." His original pick, Ronald Vitiello, was scrapped along with other

DHS officials in April, and ICE Deputy Director Matthew Albence plans to retire within a year. More here.

Related: "Trump appeals order partially blocking border wall funding," from POLITICO's Ian Kullgren.

ANOTHER ONE BITE S THE DUST: "Scott Lloyd, whose nearly two-year tenure leading the HHS refugee office sparked lawsuits and congressional inquiries, will leave the Trump administration next week, HHS announced Wednesday," POLITICO's Dan Diamond reports. "Lloyd ran the refugee office for most of 2017 and 2018 as HHS was taking custody of thousands of migrant children separated from their families under the administration's zero-tolerance border enforcement policy."

"HHS leaders previously concluded that Lloyd mismanaged efforts to reunify families," Diamond reports. Lloyd's moves to block unaccompanied teenage girls in federal custody from obtaining abortions initiated an ACLU-led legal battle that went all the way to the Supreme Court. More from Diamond here.

IN THE STATES

FOOD STAMPS BOOST EMPLOYMENT IN RURAL AREAS: Employment increased by 0.4 percent for every $10,000 spent in food stamps in non-metropolitan counties between 2001 and 2014, USDA's Economic Research Service found. As POLITICO's Catherine Boudreau reports, it was the agency's first-ever statistical analysis of the economic stimulus of payments from the Supplemental Nutrition Assistance Program. "The Obama administration's 2009 stimulus package authorized a large increase in SNAP benefits during the recession and its immediate aftermath," she explains.

"SNAP redemptions [the value of SNAP benefits redeemed by SNAP-authorized stores] could have a larger economic stimulus impact than many other forms of government spending per dollar spent, especially during a recession, because they are paid directly to low-income people," the report said. More here.

FINES RACK UP OVER D.C.'S 'BAN THE BOX': D.C. employers have faced nearly $500,000 in charges over violations of the city's "ban the box" law, which

bars employers from inquiring about an applicant's criminal history before hiring, The Washington Post's Justin Wm. Moyer reports. Since passing the Fair Criminal Record Screening Act in 2014, the city has levied 1,100 charges for discrimination under the law, according to Moyer, and "more than 90 percent of those charges related to criminal background questions that appeared on job applications."

D.C. Office of Human Rights Director Mónica Palacio told the Post that "some large multinational employers" changed their policies in response to the law. Large businesses that don't comply can face fines of up to $5,000. More here.

POLITICO LAUNCHES NEW GLOBAL PODCAST: Trade. Technology. The environment. The globe is beset by profound challenges that know no political bounds. But are our world leaders up to the task of solving them? POLITICO's newest podcast, "Global Translations" presented by Citi and launching on June 6, will go beyond the headlines, uncovering what's really at stake with the most pressing issues of our time, the political roadblocks for solving them and the ideas that might just propel us forward. Subscribe to receive the first episode at launch.

UNIONS

DOZENS OF DEMOCRATS PRESS DELTA OVER ANTI-UNION CAMPAIGN: Some 72 House Democrats signed on to a letter with Rep. Mark Pocan (Wis.) urging Delta Air Lines CEO Ed Bastian "to immediately cease all efforts" to dissuade the company's workers from joining the International Association of Machinists and Aerospace Workers. The letter, dated Tuesday, said the company has made "misleading and deceptive claims about the role of a union and about the IAM specifically."

The IAM filed charges earlier this month with the National Mediation Board against Delta, alleging the company's "anti-union" campaign has interfered with a union drive by its flight attendants and baggage handlers. That campaign was brought into the spotlight earlier this month when a photo of a provocative anti-union poster, part of a Delta push called "Don't Risk It, Don't Sign It," prompted

a Twitter backlash and inquiries from several Democrats. Nine senators, including presidential hopefuls Bernie Sanders and Elizabeth Warren, also penned a letter to Bastian calling the anti-union effort "insulting and demeaning." A Delta spokesperson told Morning Shift that IAM's claims "are completely baseless." Read the latest letter here.

WALKOUT AT VOX MEDIA: Hundreds of workers at Vox Media on Wednesday staged a one-hour walkout "to urge management to agree to a fair contract," the Vox Media Union said on Twitte r. According to the union , workers have been negotiating with management for over a year and the walkout stemmed from issues including "guaranteed annual raises and equitable minimum wage scales," "fair retroactive wage increases" and "full and fair severance" for laid off employees. Vox Media did not respond to Morning Shift's request for comment.

WHAT WE'RE READING

— "California Assembly passes gig work bill, limiting contractor status," from The San Francisco Chronicle

— "Joint Chiefs chairman dodges on funding for border wall," from POLITICO

— "The Fed's dangerous 'new normal'" from The Agenda

— "White House kills plan for expanded criminal background che cks for federal jobs," from The Washington Post

— "The Moneyball Fix for Immigration Policy," from POLITICO Magazine

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Cc:	Burdick, Ruth E.
Subject:	Outokumpo Stainless Opinion
Date:	Monday, May 13, 2019 3:44:57 PM
Attachments:	Outokumpo Stainless 17-15498 11th Cir.pdf

The Eleventh Circuit issued the attached decision today.

Margaret Yale Kennedy
Paralegal Specialist
Appellate & Supreme Court Litigation Branch
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
202-273-0027
202-273-0191 (fax)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 17-15498, 18-10198

Agency No. 15-CA-070319

OUTOKUMPO STAINLESS USA, LLC,

Petitioner/Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

Petitions for Review of a Decision of the
National Labor Relations Board

(May 13, 2019)

Before WILSON, JILL PRYOR and TALLMAN,[*] Circuit Judges.

[*] Honorable Richard C. Tallman, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

TALLMAN, Circuit Judge:

Outokumpu Stainless USA, LLC (the "Company") petitions for review of an order of the National Labor Relations Board ("NLRB" or the "Board"), which cross-applies for its enforcement. We have jurisdiction under 29 U.S.C. §§ 160(e) & (f). We deny the petition for review and grant the application for enforcement.

I

On April 30, 2012, the parties entered into a settlement agreement (the "Settlement Agreement") that resolved unfair labor practices charges filed by the AFL-CIO accusing the Company of implementing illegal anti-union policies to frustrate organizing efforts at one of its steel rolling mills in Alabama. The Settlement Agreement required the Company to post a stipulated remedial notice (the "Notice") on its bulletin board and online intranet site for its employees. The Settlement Agreement also required the Company to "comply with all the terms of the provisions of [the] Notice," which included revoking union-related rules for employee activity on employer time and expunging employee disciplinary records related to enforcement of those rules.

The Settlement Agreement further explicitly provided for default proceedings

> in case of non-compliance with any of the terms of this Settlement Agreement by the [Company] . . . . [T]he General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The [Company] understands and agrees that all of the

> allegations of the complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the [Company] defaulted on the terms of this Settlement Agreement.

In advance of posting the Notice on May 17, 2012, the Company posted a side letter ("Side Letter") on the bulletin board and intranet site that, among other things, (1) blamed the union for "prevent[ing employees] from exercising [their] right to vote and hav[ing] a choice," and (2) repeatedly emphasized that the Company had not been "found guilty" of labor law violations. The Side Letter also remained posted for the 60-day period that the Company was required to post the Notice.

Subsequently, the NLRB's Regional Director informed the Company that it believed the Side Letter constituted non-compliance with the terms of the Settlement Agreement, and thus the Board could set aside the Settlement Agreement and enter a default judgment against the Company for the original violations of the National Labor Relations Act, 29 U.S.C. § 158(a) ("Section 8(a)"). After a complex procedural history, the Board's general counsel eventually went forward with default proceedings on the union's original Section 8(a) charges of unfair labor practices by the Company under this theory of liability.

On November 16, 2015, the parties filed a joint motion and stipulation of facts and exhibits, requesting that the noncompliance issues be decided without a hearing based on the stipulated record. An administrative law judge ("ALJ") then

set aside the Settlement Agreement and entered a default judgment pursuant to the terms of that agreement. The Board affirmed on appeal.

II

We review the Board's factual findings for substantial evidence. *N.L.R.B. v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1370 (11th Cir. 2012) (citing 29 U.S.C. § 160(e)). This is a narrow standard of review designed to allow disruption of the NLRB's decision only when the NLRB exercises its discretion "in an arbitrary or capricious manner." *Id*. (citing *Daylight Grocery Co. v. N.L.R.B.*, 678 F.2d 905, 908 (11th Cir. 1982)). "It is for the Board to regulate its own procedures and interpret its own rules, so long as it does not act unfairly or in an arbitrary and discriminatory manner," and we "give significant deference to the Board's chosen remedy." *N.L.R.B. v. Goya Foods of Fla.*, 525 F.3d 1117, 1125–26 (11th Cir. 2008). Moreover, the Board's "interpretation of its own precedent is entitled to deference."[1] *Ceridian Corp. v. N.L.R.B.*, 435 F.3d 352, 355 (D.C. Cir. 2006); *see also Boch Imports, Inc. v. N.L.R.B.*, 826 F.3d 558, 568–69 (1st Cir. 2016) (same).

III

We address two issues: (1) whether posting the Side Letter constituted "non-compliance with any of the terms of th[e] Settlement Agreement," and (2) if so, whether immediate entry of default judgment was permissible. We hold that the

[1] The Company's counsel did not dispute this proposition at oral argument.

Company's posting of the Side Letter constituted non-compliance with the terms of the Settlement Agreement, and that default judgment was thus proper under the plain terms to which the Company had previously agreed.

A

Non-compliance with the terms of a settlement agreement is a term of art in labor law that has existed for almost 50 years in the Board's precedent, *see, e.g.*, *Gould, Inc.*, 260 N.L.R.B. 54, 58 (1982) (holding that a side letter castigating the union in an attempt to influence employee voting undermines the purpose of a notice and thus amounts to "noncompliance with [the] terms" of a settlement agreement); *Arrow Specialties, Inc.*, 177 N.L.R.B. 306, 308 (1969), *enfd*. 437 F.2d 522 (8th Cir. 1971) (a company "had committed acts constituting non-compliance with the terms of a settlement agreement and had breached the agreement" by posting a similar side letter that "minimize[d] the effect of the Board's notice"), and is a principle that has been adopted by multiple circuits, including the Fifth Circuit prior to the separation of this Court, *see News-Texan, Inc. v. N.L.R.B.*, 422 F.2d 381, 384–85 (5th Cir. 1970); *N.L.R.B. v. Union Nacional De Trabajadores*, 611 F.2d 926, 930 (1st Cir. 1979) (citing *News-Texan* and invoking the principle against a union letter). Such non-compliance includes, among other things, posting a side letter that undermines the purpose and effectiveness of the remedial Board notice. *See Gould*, 260 N.L.R.B. at 57–58; *Arrow Specialties*, 177 N.L.R.B. at

308. Such labor peace agreements also generally include applicable laws "at the time of the making of a contract . . . and form a part of the contract as if they were expressly incorporated into it." *Siemens Power Transmission & Distrib., Inc. v. Norfolk S. Ry. Co.*, 420 F.3d 1243, 1251 (11th Cir. 2005); *see also Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350 (11th Cir. 2000) ("Principles governing [contracts] apply to interpret settlement agreements."). The rule is akin to the common-law implied covenant of good faith and fair dealing read into the performance of all contracts. *See* Restatement (Second) of Contracts § 205 cmt. D (1981).

The Company cites two cases to the contrary where the Board held that side letters did not evidence sufficient non-compliance to sustain a violation, finding an employer had not breached the terms of a settlement agreement: *Littler Diecasting Corp.*, 334 N.L.R.B. 707 (2001), and *Deister Concentrator Co., Inc.*, 253 N.L.R.B. 358 (1980). We defer to the Board's interpretation of its own precedent in holding that the Side Letter here is more similar to those posted in *Gould* and *Arrow* than those posted in *Little* and *Deister*. *See Ceridian*, 435 F.3d at 355. Indeed, the ALJ and all three of the Board's members in this case, including the dissenter, agreed that the Side Letter constituted non-compliance with the terms of the Settlement

Agreement under *Gould* sufficient to set aside the Settlement Agreement.[2] *See Outokumpu Stainless USA, LLC*, 365 N.L.R.B. 127 (2017) (dissent agreeing that the Board could set aside the Settlement Agreement for non-compliance).

But even if we did not defer to the Board on this determination, we would hold that the Side Letter constitutes non-compliance with the Settlement Agreement's terms. *See News-Texan*, 422 F.2d at 384–86. The Side Letter, posted and distributed before the Notice, blamed the union for delaying the election, emphasized that the Company did nothing wrong, and suggested that the Company had no other obligations under the Settlement Agreement. The Side Letter thus subverted the purpose and effectiveness of the Notice, constituting non-compliance with the terms of the Settlement Agreement under *Gould* and other precedent by undermining the negotiated resolution of the unfair practice charges lodged by the union. *See id.*; *Gould*, 260 N.L.R.B. at 57–58. In the face of decades of Board and circuit-level law, the Company's argument that "the terms of the Settlement Agreement" only included express terms spelled out in the Settlement Agreement is simply unavailing. The Board was therefore correct to hold that the Side Letter constituted non-compliance with the terms of the Settlement Agreement.

B

[2] The dissent focused instead on the propriety of immediately entering the default judgment, which deprived the Company of the ability to further contest the entry of judgment on the original Section 8(a) charges.

Our conclusion on the second issue follows easily from the first: because the Side Letter constituted non-compliance with the terms of the Settlement Agreement, the contract's default provisions were triggered and appropriately employed to enter default against the Company for the underlying Section 8(a) violations that the Settlement Agreement was meant to resolve. Under its plain provisions, the only issue the Company could contest in these proceedings was whether it failed to comply with the terms of the Settlement Agreement.[3] It contested that issue and lost. Once that was determined, the Settlement Agreement provided for entry of default judgment on the underlying Section 8(a) violations.

The Company's First Amendment Free Speech rights are not implicated because the Board did not find that the Side Letter itself was a violation of Section 8(a) such that section 8(c) was implicated. *See* 29 U.S.C. § 158(c) (providing that an employer's expression of "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice" under Section 8(a)). And, as the Board argued in its brief, the Company voluntarily limited its right to post a Side Letter that undermined the Notice by negotiating and then entering into the Settlement Agreement. Neither Section 8(c) nor the First Amendment insulate the Company

[3] Any argument from the Company that it was entitled to a hearing on the non-compliance issue was waived. The Company submitted a joint stipulation of material facts outlining agreement on all the relevant facts to this inquiry and asked the ALJ to enter a ruling without a hearing.

from breach of the Settlement Agreement by undermining its purpose.

The Company is a sophisticated employer. It is bound by the contract that it signed with the NLRB and must face the consequences, regardless of whether the result may seem harsh or whether the NLRB no longer regularly includes these default provisions in its settlement agreements. Default judgment was proper here.

IV

The Company's petition for review is DENIED and the Board's Application for Enforcement of its Order is GRANTED.

From: GovExec Today
To: Ring, John
Subject: Pentagon accused of ducking bargaining rules with IT employee transfers; billions in potential savings by reducing government duplication
Date: Wednesday, May 29, 2019 5:03:25 AM

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GovExec Today

May 29, 2019

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Union Accuses Pentagon of Ducking Bargaining Rules With Transfers of IT Employees // Erich Wagner

IT workers at the Defense Contract Management Agency are not being given the opportunity to accept or decline being moved to the Defense Information Services Agency, labor officials said.

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From: Martin, Andrew
Subject: Politico Pro: 1 year after Janus, unions are flush
Date: Thursday, May 16, 2019 2:44:08 PM

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1 year after Janus, unions are flush

By Rebecca Rainey and Ian Kullgren

05/16/2019 02:36 PM EDT

One year after the Supreme Court dealt government employee unions a severe financial blow, the country's biggest public employee unions remain surprisingly flush.

In its June 2018 ruling in *Janus v. American Federation of State, County and Municipal Employees*, the high court shut off a crucial source of revenue for unions that represent government workers: mandatory fees collected from union nonmembers to cover their share of collective bargaining costs.

As *Janus*' one-year anniversary approaches, a POLITICO review of 10 large public-employee unions indicates they lost a combined 309,612 fee payers in 2018. But paradoxically, all but one reported more money at the end of 2018. And collectively, the 10 unions reported a gain of 132,312 members. (For a graphic representation of POLITICO's findings, click here.)

"In talking to folks, my perception is that there has been good news, that membership has not been falling off dramatically," said Sharon Block, a former Obama Labor Department official who now runs the Labor and Worklife Program at Harvard Law School.

The unions' financial and membership gains are especially striking given that *Janus* was, for government employee unions, a double-edged sword.

In addition to taking away fair-share fees, the Supreme Court took away much of the reason for government employees to remain union members. That's because *Janus* enabled a government worker, simply by quitting the union, to enjoy the benefits of union representation without having to pay for them. Many anticipated *Janus* would prompt government workers to quit unions in droves, driving down those unions' revenues even further.

That fear wasn't misplaced. A state-by-state analysis of Bureau of Labor Statistics data on the percentage of government employees represented by labor unions, broken down by Barry Hirsch of Georgia State University and David Macpherson of Trinity University, indicates that public unions' reach among state employees has receded somewhat since *Janus*.

Before *Janus*, 22 states and the District of Columbia allowed unions to collect agency fees from nonmembers. In those states, the percentage of public employees represented by a union — union members and nonmembers — dropped 1.1 percentage points, to 52.8 percent in 2018, down from 53.9 percent in 2017. The percentage of public employees in those states who were union members dropped 1 percentage point, to 49.7 percent in 2018, down from 50.7 percent in 2017. In total, public unions in those states lost union coverage for 115,625 employees.

By comparison, the 28 states that barred public employee fair-share fees prior to the ruling

showed no change during that period in the percentage of public sector employees represented by a union, and a tiny (0.1 percentage point) bump in union membership.

Four of the 10 large public employee unions surveyed by POLITICO — the Service Employees International Union, the United Food and Commercial Workers, Laborers' International Union of North America and the United Automobile Workers — also represent many private-sector workers, who were unaffected by *Janus*. So it's hard to judge whether *Janus* caused that group's combined loss of about 59,000 members in 2018 (in addition to losing more than 100,000 agency-fee payers).

Because the 10 surveyed unions haven't yet reported to the Labor Department membership numbers for 2019, POLITICO can gauge *Janus*' effects on them only during the first six to eight months the ruling was in effect; significant attrition may yet occur in 2019 and the years that follow.

Even so, available evidence indicates public employee unions are weathering *Janus* surprisingly well.

The nation's single largest public employee union, the 3 million-member National Education Association, has not yet filed with the Labor Department and did not provide POLITICO specific data. But in an interview, NEA President Lily Eskelsen García said the union took in more money than last year by persuading fee payers to become full members.

"We sit here today having budgeted for what we thought might be the worst-case scenario — of a drop of a couple hundred thousand members — and we are up several thousand," García said**.**

The 1.3 million-member AFSCME, which describes itself as the nation's largest public "services" employee union — and was the defendant in *Janus* — gained nearly 28,000 members in 2018 (even as it lost more than 110,000 agency-fee payers). The 1.7 million-member American Federation of Teachers, another public employee giant, is not required to file with the Labor Department until later this year. But it told POLITICO it gained more than 17,000 members in the eight months that followed *Janus*, even as it lost nearly 85,000 agency-fee payers.

More surprising still, eight of the nine large unions that have filed full-year 2018 data with the Labor Department reported financial gains in 2018 totaling a combined $379,384,917. The one exception — the American Federation of Government Employees, which represents federal workers — couldn't plausibly attribute its reported financial losses to *Janus* because, even before the ruling, AFGE was barred from collecting fair-share fees.

The financial gains extended even to the four government-employee unions included in POLITICO's survey that lost members in 2018 (plus those 100,000-plus agency-fee payers). SEIU, which in 2018 lost more than a thousand members (and nearly 99,000 agency-fee payers) reported a 15 percent gain in assets.

How did public employee unions end up with more money and in most cases with more members after a Supreme Court ruling that was expected to eviscerate both?

The answer appears to be preemptive organizing. "Unions were really prepared because, sadly, the outcome was really predictable," Block said.

Some of the unions raised dues. AFSCME, which has raised its minimum monthly dues an average 25 cents over each of the past 10 years, bumped its minimum monthly dues by 50 cents in 2018, to $18.40, according to its filings with DOL.

The United Food and Commercial Workers — one of the four surveyed unions that lost members in 2018 but still posted financial gains — raised its minimum monthly dues that year by $1, to $16.04. It was the first dues increase for the union since 2013, according to its filings with DOL.

Other unions planned budget cuts. The NEA said in June 2018 it was preparing to cut $28 million from its budget and would reduce its staff. AFSCME, in addition to bumping dues higher than in previous years, continued a trend of reduced political s pending. In 2018, the union shelled out $53.1 million for political activities, compared to $55.3 million in 2016 and $64.6 million in 2014, according to DOL filings.

Labor leaders started arming themselves years ago as conservative foundations and right-to-work groups backed lawsuits to eliminate agency-fee payers. The rationale behind these lawsuits was that fair-share fees were compelled political speech that violated union nonmembers' First Amendment rights. Public employee unions were already barred from using fair-share fees to pay for political activities; the fees could be used only to pay for collective bargaining. But the lawsuits argued that even collective bargaining constituted political speech when performed by a union that represented government employees.

One of the most promising lawsuits, first filed in 2013, was *Friedrichs v. California Teachers Association*. Bankrolled in large part by the Bradley Foundation, the case was argued before the Supreme Court in January 2016. Unions braced themselves for a loss after Justice Antonin Scalia, the only Republican appointee deemed a possible ally, indicated in his questions that he would likely vote against fair-share fees.

In response, unions began persuading non-union members to become full-time members and organizing workplaces that didn't have a union at all.

"We knew which Supreme Court justices would be with us and which ones would not be with us, and lo and behold we were right," said García, the NEA president. "We didn't just sit back and put our feet up."

Scalia's death in February 2016 brought unions a reprieve by deadlocking the high court 4-4 on *Friedrichs*, leaving in place a lower court's ruling upholding fair-share fees. But the election of President Donald Trump signaled the status quo wouldn't last long.

Conservative legal groups paint a more sinister portrait of public employee unions' pre-*Janus* preparations, arguing they were underhanded — and perhaps illegal. Since *Janus*, conservative organizations have filed lawsuits accusing unions of everything from imposing impossibly small disenrollment windows to deceiving workers into signing paperwork that made them union members.

"The *Janus* decision sits inside a set of other attacks that extremists in the right wing have been inflicting on working people and their organizations for decades," SEIU President Mary Kay Henry told POLITICO.

The Fairness Center, a Pennsylvania-based conservative nonprofit, filed a lawsuit against

SEIU on behalf of a public employee in Lehigh County, Pa., who said he was barred from leaving his union save for a 15-day window before the expiration of the collective bargaining agreement.

"Part of the story here is that maybe the numbers don't reflect reality — that there are actually a number of people kept from leaving their unions," said David Osborne, the Fairness Center president. "Unions have also asked people to sign forms with the union that say people agree to stay with the union for a long period of time, and even if they choose to leave a union they still have to pay union dues."

But SEIU's Henry said *Janus* offered a perfect foil for the larger war organized labor is facing.

"*Janus* was seized on by us and other parts of the labor movement as an opportunity to re-educate and activate our members in a much bigger fight that we're all committed to having," she said.

The National Right to Work Legal Defense Foundation asked the Supreme Court to compel SEIU to return $32 million in fees to home-care workers in Illinois, challenging a state law that permits home care workers for Medicaid recipients to unionize. (The Trump administration recently issued a rule barring states from the practice.) Conservative groups are also pursuing a broader case to require unions to refund bargaining fees collected before the *Janus* ruling.

Meanwhile, conservative groups are urging workers to leave unions. The Freedom Foundation, a conservative nonprofit active in the Pacific Northwest, said its "multifaceted" campaign to "educate" employees prompted 45,000 government employees to leave their unions in Washington, Oregon and California.

"People don't know [about the ruling]," said Ashley Varner, a Freedom Foundation spokesperson. "They're not being told at work, they're certainly not being told by their government union reps, so we have to find more ways to reach people."

Unions are asking some state legislatures to come to their aid. Last month, Democratic Washington Gov. Jay Inslee signed a bill preempting conservative groups' efforts to force the return of fair-share fees. In April, Illinois Gov. J.B. Pritzker signed a bill banning local governments from adopting right-to-work laws.

Before the Supreme Court even ruled in *Janus*, New York Gov. Andrew Cuomo signed legislation saying unions need not provide full benefits to workers who aren't members.

"It is the union movement that drives the Democratic Party," Cuomo said upon signing the bill. "And that's why they want to weaken the union movement."

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https://subscriber.politicopro.com/employment-immigration/article/2019/05/1-year-after-janus-unions-are-flush-1447266

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This email was sent to Andrew.Martin@nlrb.gov by: POLITICO, LLC 1000 Wilson Blvd. Arlington, VA, 22209, USA

From: Martin, Andrew
Subject: Politico: NLRB dismisses UAW petition to unionize Volkswagen plant
Date: Wednesday, May 22, 2019 1:39:25 PM

By Ian Kullgren

05/22/2019 12:40 PM EDT

The National Labor Relations Board today ordered a regional director to reject a United Auto Workers bid to unionize a Volkswagen plant in Chattanooga, Tenn.

The board's Republican majority said the petition for a plant-wide union vote may not be considered until an earlier push for a smaller bargaining unit is resolved.

"Board will dismiss election petitions filed before the end of the certification year that seek to represent some or all of the employees in the certified unit, including petitions that seek to include employees in the certified unit as part of a broader, plant-wide unit," the board wrote.

The UAW said last month that it would resolve the matter by withdrawing its petition to organize the maintenance workers and including them in its new petition for a plant-wide vote. But that gesture apparently didn't placate the board, which gran ted a stay at the request of Volkswagen.

The UAW had sought a third vote at the plant in five years. The union did not immediately comment on the board's ruling.

From: Martin, Andrew
Subject: Politico: Democrats introduce labor bill
Date: Thursday, May 2, 2019 4:47:24 PM

Democrats introduce labor bill

By Rebecca Rainey

05/02/2019 04:44 PM EDT

House and Senate Democrats introduced sweeping legislation today to strengthen collective bargaining rights and increase penalties to employers when they violate labor laws.

The "Protecting the Right to Organize Act," introduced with 140 House and Senate co-sponsors, would permit the NLRB to level monetary fines against employers that terminate a worker wrongfully or that, in violating the National Labor Relations A ct, cause a worker to suffer economic harm. Under current law, the NLRB may order reinstatement or collection of back pay, but it can't level fines.

"There are currently no meaningful penalties for predatory corporations that use unlawful tactics to discourage workers from organizing a union," said Education and Labor Chairman Bobby Scott (D-Va.), who introduced the legislation in the House. "T he PRO Act is a comprehensive proposal to ensure that workers have the right to stand together and negotiate for higher wages, better benefits and safer working conditions."

The bill would allow the NLRB to hold corporate directors and officers individually liable for any violations of the NLRA of which they had prior knowledge. In addition, the bill would make it easier for independent contractors to establish in court that they are misclassified employees.

The bill includes two provisions intended to push back against recent Supreme Court decisions.

Addressing the Supreme Court's decision last year in *Janus v. AFSCME*, which ruled illegal the mandatory fair-share fees that public employee unions charge union nonmembers, the bill would allow employers and unions to agree contractually to t he collection of such fees to help cover the cost of collective bargaining.

And reversing the high court's ruling in *Epic Systems Corp. v. Lewis*, which upheld employment contract clauses that compel workers to take any legal class actions against the company into private arbitration, the bill would bar such clauses, guaranteeing workers the right to take class actions against their employers into court.

The bill would also grant workers a private right of action, allowing them to bypass the NLRB and take lawsuits alleging violations of the NLRA directly to court. And the bill would bar employers from requiring workers to attend meetings in which management discourages them from unionizing.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift, presented by National Partnership for Women & Families: Trump"s immigration offer — Minimum wage compromise? — Another one bites the dust
Date: Thursday, May 16, 2019 10:03:27 AM

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2018 Newsletter Logo: Morning Shift

05/16/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Alice Ollstein

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— President Donald Trump today will announce his administration's legislative plan to overhaul legal immigration.

— Centrist Democrats proposed a compromise on an intra-party dispute over raising the hourly minimum wage to $15.

— Another Labor Department nominee threw in the towel: Scott Mugno, OSHA.

**** A message from NPWF and NWLC:** Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce urge Congress to pass the bipartisan Pregnant Workers Fairness Act as a step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.****

GOOD MORNING! It's Thursday, May 16, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

TRUMP'S IMMIGRATION OFFER: President Donald Trump this afternoon will announce a legislative proposal "to move the United States to a system that would admit immigrants based on merit and not family ties, as well as boost security at the southern border," POLITICO's Anita Kumar and Eliana Johnson report. The plan, prepared by Jared Kushner, will be an "opening offer" from the administration.

But Kushner "has spent little time selling the plan to House Democrats," Kumar and Johnson report, and his proposal includes nothing to protect "Dreamers," undocumented immigrants who entered the United States as children, who lost their protection when the Trump Justice Department moved to terminate the Deferred Action for Childhood Arrivals program. (That termination was

subsequently suspended by multiple court rulings, pending a probable ruling next year by the Supreme Court.) The White House has discussed adding components to appease immigration restrictionists, who are unhappy that Trump's plan won't reduce net legal immigration. These include "a mandatory nationwide E-Verify system to check the immigration status of workers, as well as changes to asylum and detention laws to discourage migrants from seeking refuge at the border." More here.

Related: "Graham seeks Democratic compromise on asylum and detention bill," from POLITICO's Ted Hesson

WAGES

MINIMUM WAGE COMPROMISE?: "A band of Democratic moderates in the House is working to end a standoff with progressives on legislation to boost the minimum wage — potentially resolving a fight that has stalled one of the party's top priorities," POLITICO's Sarah Ferris reports.

The plan, crafted by Rep. Tom O'Halleran (D-Ariz.), is "an insurance option of sorts," according to Ferris: an amendment requiring "that the Government Accountability Office conduct a study on the policy's economic impacts after roughly two years. The House Education and Labor Committee would then have a chance to recommend what action — if any — House leadership should take."

But it's not clear Rep. Bobby Scott (D-Va.) feels much need to compromise. "I think we'll get to 218 as we are," he told Ferris last week, adding, "We're obviously open to negotiation." Meanwhile, the conservative Employment Policies Institute is running a full page ad today in The Hill arguing against the proposal's move to eliminate a lower "tipped wage" for workers who receive gratuities. View the ad here. More from Ferris here.

ANOTHER ONE BITES THE DUST: "Scott Mugno, the Trump administration's nominee to run the Occupational Safety and Health Administration, notified the White House Tuesday that he was withdrawing his nomination," POLITICO's Rebecca Rainey reports. A former FedEx safety executive, Mugno was first nominated in 2017 and was expected to receive a full Senate vote soon. A source close to the nominee told POLITICO in January that he felt "extremely frustrated by the Senate's inability to get its act together to confirm his nomination."

Mugno follows Mark Gaston Pearce, who withdrew from re-nomination to his

Democratic NLRB seat in February, citing a political "tug-o-war;" Chai Feldblum, who withdrew from re-nomination to her Democratic EEOC seat in January after being blocked by Sen. Mike Lee (R-Utah); and Daniel Gade, who withdrew from his nomination to a Republican EEOC seat in December, blaming a "political mess" in the Senate. The problem isn't confined to the NLRB and EEOC; only 57 percent of DOL's political appointees have been confirmed so far under the Trump administration, according to a tracker compiled by the Washington Post and Partnership for Public Service. More from Rainey here.

IMMIGRATION

LGBT FAMILIES FACE HURDLES IN OBTAINING BIRTHRIGHT CITIZENSHIP: A policy change at the State Department last year makes it difficult for the children of U.S. LGBT couples to become citizens if they were born overseas, Scott Bixby reports for The Daily Beast. New rules issued last summer, Bixby explains, altered the State Department's interpretation of the Immigration and Nationality Act, under which a child born abroad to a U.S. citizen parent or parents may acquire U.S. citizenship at birth if certain requirements are met. But the agency now stipulates that the child must be related biologically to that parent or parents. "If the child does not have a biological connection to a U.S. citizen parent," the State Department's Bureau of Consular Affairs says on its website, "the child will not be a U.S. citizen at birth."

Under the policy, children born from surrogacy and other reproductive assistance "are considered to be born 'out of wedlock,' in the State Department's words," even if their parents are legally married. If the child falls in that category, the parents must submit DNA tests proving a genetic link to one or both parents; demonstrate that they can support the child financially; and show that they lived in the U.S. for at least five years prior to the child's birth. "For parents of non-traditional families," Bixby writes, "the policy change has been a disaster, leaving them to navigate the labyrinthine immigration legal system with little guidance from the State Department and, at the moment, little recourse for appeal." More here.

WHATEVER HAPPENED TO 'ABOLISH ICE'?: "Abolish ICE," a rallying cry heard from multip le 2020 hopefuls at the height of last summer's migrant family separations, has fallen out of fashion. Kirsten Gillibrand, Kamala Harris, Elizabeth Warren, and Bernie Sanders "simply stopped talking about it," BuzzFeed's Molly Hensley-Clancy and Nidhi Prakash report. "On the campaign trail, they stick to

much more popular immigration issues, like ending child separation at the border," Hensley-Clancy and Prakash write, noting that the Democratic Party has "struggled to figure out its message on immigration."

"**Its safe to say** a lot of folks in immigrant rights, especially our wing of it, are very dissatisfied with what any Democrat has been saying," Juan Prieto, a communications strategist for the California Immigrant Youth Justice Alliance told Buzzfeed. "The Democrats aren't bold enough for vision, they'd rather fight fire with a water gun." POLITICO's Timothy Noah wrote in October that the Abolish ICE movement "never went mainstream." More from Buzzfeed here.

UNIONS

DUES BLUES: Eight home health care workers sued the Trump administration in the Northern District of California to block a new rule that bars their union, SEIU, from deducting dues from their Medicaid paychecks automatically. The lawsuit follows another challenge Monday by five Democratic attorneys general. The rule is set to take effect in July.

The workers in the case argue that the new federal rule violates their First Amendment right to free association and the Constitution's Equal Protection Clause. "It's outrageous that home care workers like me are being singled out," said Camille Christian, a home care worker from Alameda, California. "This rule tries to prevent us from using payroll deduction for any purpose, even to contribute to our healthcare or for transportation costs or to support our union. How would you feel if the government told you how to spend your wages?" Read the complaint here.

DELTA DRAMA: The International Association of Machinists and Aerospace Workers filed charges Wednesday with the National Mediation Board against Delta Air Lines, alleging that the airline's "anti-union" campaign has interfered with a union drive by Delta flight attendants and baggage handlers. Last week a photo of a provocative anti-union poster, part of a Delta campaign called "Don't Risk It, Don't Sign It," prompted a Twitter backlash and inquiries from several Democrats. The poster said: "Union dues cost around $700 a year. A new video game system with the latest hits sounds fun. Put your money towards that instead of paying dues to the union."

Sen. Patty Murray (D-Wash.) met with the airline on Tuesday and pressed it to apologize for the poster. Murray's staff also asked Delta to stop interfering with

employees' efforts to unionize, POLITICO's Ian Kullgren reports. But, according to Murray, the airline would not commit to eithe r request.Nine Senators, including presidential hopefuls Bernie Sanders and Elizabeth Warren penned a letter Wednesday to Delta CEO Ed Bastian calling the anti-union effort "insulting and demeaning." A Delta spokesperson told Morning Shift that IAM's claims "are completely baseless." Read the Machinists' complaint here, and read the s enators' letter here.

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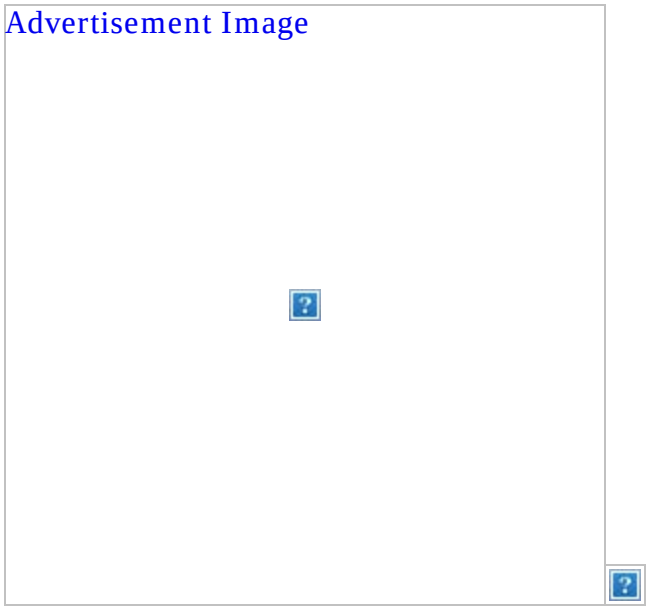

COFFEE BREAK

— "Michigan Republican lawmaker Larry Inman accused of trying to sell his vote," from The Detroit Free Press

— "'That's Jus t Insane': Australia's Secret Deal to Take In Rwandan Guerrillas," from POLITICO Magazine

— "TSA bag screeners will be among those possibly sent to southern border," from POLITICO

— Report: "Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration," from the U.S. Chamber Institute for Legal Reform

— "Work in America Is Greedy. But It Doesn't Have to Be." from The New York Times

— "U.S. Births Fall to Lowest Level Since 1980s," from The Wall Street Journal

— "Immigrant soldiers now denied US citizenship at higher r ate than civilians," from McClatchy

THAT'S ALL FOR MORNING SHIFT!

**** A message from NPWF and NWLC:** More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, which made it illegal to discriminate on the basis of pregnancy, childbirth or related medical conditions. It's time to clarify and strengthen existing federal protections for pregnant workers. Leading companies understand that women's labor force participation is critical to the strength of companies, the growth of our economy and the financial security of modern families. Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce are urging Congress to pass the bipartisan Pregnant Workers Fairness Act as an important step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.**

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Subject: Legal News FYI 05-15-19
Date: Wednesday, May 15, 2019 7:45:42 AM
Attachments: image001.png

Wednesday, May 15, 2019

Good Step For Gig Companies: Advice Memo From NLRB's General Counsel Concludes That Uber Drivers Are Contractors

Lexology 15 May 2019 07:09

It's been a roller coaster two weeks for gig economy companies. On April 29, the U.S. Department of Labor handed gig economy companies a nice outcome by issuing an opinion letter confirming that typical gig workers are, indeed, independent contractors....

Arbitrator Diversity Efforts Find Small Candidate Pool

BloombergLaw - Daily Labor Report 15 May 2019 07:06

By Patricio Chile There's a diversity problem in arbitra ion; in one arbitra ion service provider's case, the mediator roster is made up of 17% women and 13% of individuals who identify as ethnically or racially diverse. Curating a lineup of arbitrators...

Uber Drivers Don't Need NLRB, Ride-Hail Driver Groups Say

BloombergLaw - Daily Labor Report 15 May 2019 06:56

• Driver organizations anticipated unfavorable NLRB finding • Focus will be on improving pay, working conditions without unions By Robert Iafolla Uber and Lyft drivers' organizing efforts won't be hurt by the recent determination that Uber drivers aren't...

Uber Drivers Are Contractors, Agency Finds

New York Times, The (New York, NY) 15 May 2019 00:00

The Na ional Labor Rela ions Board , handing an important victory to Uber , has concluded that the company's drivers are contractors, not employees. The move, outlined by the board's general counsel in a memorandum released Tuesday, deals a blow to...

Firing Sleeping Worker Before Union Election Violated NLRA

HR Magazine 14 May 2019 21:39

An employer violated the National Labor Relations Act (NLRA) when it fired a worker for sleeping during the night shift two days before a union election without considering the merits of the termina ion. Instead, the employer was trying to strengthen its...

Democrats have an ambitious plan to save American labor unions Republicans will hate it.

VOX.com 14 May 2019 21:14

House Democrats have a plan to make unions great again. They're trying to get support for a sweeping labor reform bill hat would reverse decades of Republican-backed policies meant to crush labor unions. The Protecting the Right to Organize Act (PRO...

Are You a Joint Employer? That May Change Under the DOL's Proposed...

National Law Review 14 May 2019 18:20

Article By As announced in an April 1, 2019, Notice of Proposed Rulemaking, he DOL has proposed to substantially revise the standard for determining joint-employer status conferring joint and several liability upon the primary employer and any other...

Blog Post: Steel Co. Flouted NRLB Settlement With Union, 11th Circ. Says

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 14 May 2019 13:38

The Eleventh Circuit has ruled that the National Labor Relations Board was right to find stainless steel producer Outokumpu failed to comply with a deal settling claims it tried to illegally stifle organizing efforts at an Alabama mill by posting a..

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift, presented by National Partnership for Women & Families: Geale gets the boot — Trump officials head to Congress to push border funding — Giggity
Date: Wednesday, May 15, 2019 10:26:07 AM

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2018 Newsletter Logo: Morning Shift

05/15/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ian Kullgren

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

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QUICK FIX

— DOL Secretary Alex Acosta's chief of staff, Nick Geale, is being ousted by the White House after an investigation concluded his management style weakened morale.

— Top Trump administration officials are meeting with Democrats to sell them on Trump's request for an additional $4.5 billion in border funding.

— The NLRB's general counsel says Uber drivers are independent contractors, not employees.

**** A message from NPWF and NWLC:** Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce urge Congress to pass the bipartisan Pregnant Workers Fairness Act as a step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.****

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DRIVING THE DAY

GEALE GETS THE BOOT: Labor Secretary Alexander Acosta's chief of staff Nick Geale will be forced out by the end of this month at the direction of White House officials, POLITICO's Ian Kullgren reports. "There was an extensive investigation," a former Trump administration official with direct knowledge told Kullgren.

The White House review concluded that Geale's interactions with employees were harming DOL morale. Geale's management style was judged abusive by many in DOL, Kullgren reports, with frequent profanity-laced dressings-down. "There are times when he goes completely loony," a former administration official told Kullgren.

Axios' Jonathan Swan, who broke the story, reports that the departure comes as senior White House officials have been frustrated with the slow pace of deregulation at the Labor Department. "For instance," Kullgren writes, "DOL has struggled for months to finalize a rule that would privatize some of the agency's apprenticeship training, as it was instructed to do by a 2017 order from President Donald Trump."

While "some have pointed to Geale as the problem," according to Swan, other officials suggest the real problem is his boss. "The pace of change has not been sufficient. [Acosta] tends to be fairly fearful of taking hard-line positions," a source told Swan. "The only question in my mind is, is it Nick Geale that's the problem? Or is he just doing his boss's bidding? It's not clear to me that Nick is the only problem. You take your cues from the top." More from Kullgren here.

ON THE HILL

OVAL TO CONGRESS: MORE BORDER FUNDING, PLEASE: Acting White House chief of staff Mick Mulvaney was on Capitol Hill Tuesday trying to sell Democrats on the administration's request for additional immigration funding to cover costs related to the border crisis and other enforcement actions, according to CQ's Kellie Mejdrich. Mejdrich added in a follow-up tweet that while staff said the focus was "on policy, not spending," it was "almost inevitable that the WH's $4.5 billion emergency supp ask will come up, given that the two are so intertwined for the administration."

Kevin McAleenan, acting secretary of the Department of Homeland Security, has a meeting scheduled next week with House Speaker Nancy Pelosi to discuss "immigration and border security issues," POLITICO's Caitlin Emma reports. Earlier this month, the White House called on Congress to approve $4.5 billion in emergency aid to address the surge of Central American immigrants at the U.S.-Mexico border, citing a "humanitarian crisis." President Donald Trump wants that proposal to be wrapped into a multi-billion disaster aid package slated for a Senate vote next week.

Democrats may include "major elements" of the president's request in the disaster legislation, Andrew Taylor reports for the Associated Press. But Trump's request for $342 million for ICE detention beds "is off the table,"

Democratic aides told Taylor. Democrats are instead "willing to fund care for more than 360,000 migrants apprehended since October." More from the AP here.

POLICY ROUNDUP

GIGGITY: Under the Trump administration, two agencies tasked with enforcing federal labor and minimum wage laws have said that Uber and other app-based drivers are "independent contractors" and therefore not covered by those legal protections. The latest to take that position, the office of the NLRB general counsel, said in a memo released Tuesday that Uber drivers are independent contractors under the National Labor Relations Act, POLITICO's Ian Kullgren reports. "The drivers had significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules, together with freedom to choose log-in locations and to work for competitors of Uber," Jayme Sophir, an ass ociate general counsel, wrote last month in an advice memo.

That follows an opinion letter issued by DOL last month clarifying that workers who are connected to jobs via smartphone-based apps don't meet the legal definition of an employee under the Fair Labor Standards Act. That letter got some pushback from Sen. Sherrod Brown (D-Ohio) and Rep. Rosa DeLauro (D-Conn.). The NLRB and DOL opinions mark yet another reversal of Obama-era policies. The NLRB advice memo came after the board's January decision in SuperShuttle DFW, Inc., which overturned the Obama-era Fed-Ex Home Delivery ruling that minimized consideration of economic opportunity in determining whether a worker is an independent contractor. And under the Obama's administration's then-Wage and Hour Administrator David Weil, the department considered "most workers" employees under the FLSA.

The memo released by the Tru mp labor board comes day after a nationwide rideshare driver strike in which thousands of Uber and Lyft drivers logged off their apps to demand better pay and working conditions. "An opinion that negates workers' rights to collective bargaining, organizing protections, and democratic unions is not shocking from this anti-worker administration," Bhairavi Desai, executive director of the New York Taxi Workers Alliance — which represents 21,000 taxi and mobile rideshare drivers — said in a statement. "Workers don't need permission to organize, and real unionists

don't need the NLRB to tell them company-dominated unions are an affront to workers."

OPM BREAKUP COMING SOON: The acting director of the Office of Personnel Management, Margaret Weichert, said Tuesday that she will she submit a bill to Congress "hopefully by Friday" to carve up OPM and move its functions to the General Services Administration and other agencies, Erich Wagner reports for Government Executive. The proposal to eliminate the agency that serves as an HR department for 2.1 million federal employees was floated in a sweeping Trump administration reorganization plan last year. "The backlogs in terms of hiring, background checks and retirement processing," Weichert said Tuesday, "those are all endemic to our structure, and throwing money at the problem doesn't fundamentally fix how we get afte r shared services support structures."

GSA would take over "training, pay and hiring, workforce planning, and the inspector general's office," Lisa Rein and Damian Paletta explained in the Washington Post last month. The Defense Department would take over background investigations, and the Office of Management and Budget would take over "high-level policies governing federal employees," an arrangement, Rein and Paletta write, "that advocates and unions are decrying as a backdoor ploy to politicize the civil service by installing political appointees close to the White House." More from the Post here and from Government Executive here.

KUSHNER'S AUDIENCE OF ONE: Lindsey Graham said Tuesday of Jared Kushner's immigration plan: "I don't think it's designed to get Democratic support as much as it is to unify the Republican Party." That's according to a tweet from Tal Kopan of the Los Angeles Times. When asked what that would achieve, Graham said it would create a "negotiating position," adding that it's "similar to the Gang of 8," the bipartisan group of eight senators who negotiated a comprehensive immigration bill in 2013 that went nowhere. "A bit different," Graham added, perhaps remembering that last part.

Republican senators received a White House briefing earlier this month on Kushner's forthcoming plan to reduce family-based immigration and replace it with a merit-based system, leaving the overall level of legal immigration constant. Despite Graham's praise, the proposal has so far gotten a mixed reception from anti-immigration groups, putting some conservative hard-

liners in a difficult position ahead of an election year.

Advertisement Image

UNIONS

L.A. TIMES GUILD WALKOUT: Staffers at the Los Angeles Times Tuesday staged their second lunchtime walkout in recent weeks over stalled contract negotiations, according to the LA Times Guild. "The @latimes has said for months they wanted to move quickly on our first contract," The Guild tweeted Tuesday. "Instead, they're sitting on their hands on key issues like severance pay and outsourcing our work to contractors — the very protections we unionized to create." In April more than 100 members participated in another walkout over the slow pace of contract talks, which started in August, Kristina Bui, vice chair of the LA Times Guild and a member of the bargaining committee told Morning Shift last month.

COFFEE BREAK

— "Google Exec's Internal Email On Its Data Leak Policy Has Rattled Employees," from BuzzFeed

— "Labor Law Safeguards f or Worker Lawsuits Imperiled at NLRB," from Bloomberg Law

— "OB-GYN Says U.S. Marshals Service Is Shackling Detained Pregnant

Migrants," from Rewire News

— "Consumers are already seeing price hikes from the last round of Trump's tariffs," from The Los Angeles Times

— "UCSF reschedules hundreds of medical appointments ahead of strike," from The San Francisco Chronicle

— "Nike responds to backlash over maternity leave policy," from CBS News

— "Here's how the U.S.-China trade war could end," from POLITICO

THAT'S ALL FOR MORNING SHIFT!

**** A message from NPWF and NWLC: More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, which made it illegal to discriminate on the basis of pregnancy, childbirth or related medical conditions. It's time to clarify and strengthen existing federal protections for pregnant workers. Leading companies understand that women's labor force participation is critical to the strength of companies, the growth of our economy and the financial security of modern families. Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce are urging Congress to pass the bipartisan Pregnant Workers Fairness Act as an important step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.****

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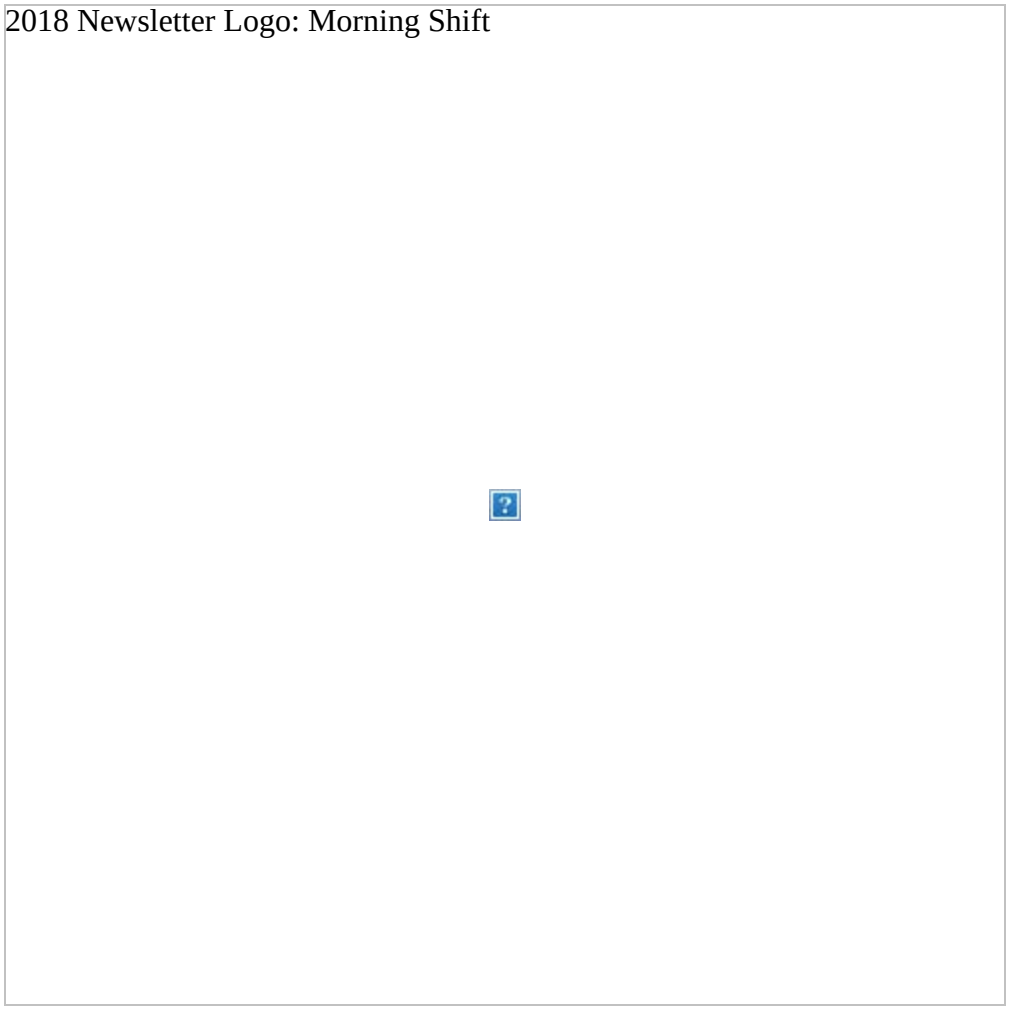

05/14/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ted Hesson and Ian Kullgren

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QUICK FIX

—The escalating trade war between the U.S. and China tanked the stock market Monday.

— Facebook will raise wages for contract workers, following a similar move last month by Google.

— Five states filed a lawsuit to overturn the Trump administration's rule barring automatic union payments for home health care workers.

**** A message from NPWF and NWLC:** Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce urge Congress to pass the bipartisan Pregnant Workers Fairness Act as a step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.****

GOOD MORNING! It's Tuesday, May 14, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @ted hesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

TRADE TENSIONS SEND STOCKS TUMBLING: The Dow Jones industrial average plunged more than 700 points, or 2.7 percent, in afternoon trading Monday following China's announcement that it will raise tariffs next month on $60 billion worth of U.S. goods. China's move comes in retaliation to President Donald Trump last week boosting tariffs to 25 percent (up from 10 percent) on $200 billion worth of Chinese goods. "Wall Street traders and economists say that if Trump doesn't make a deal," write POLITICO's Ben White and Gabby Orr, and instead carries through his threat to extend the tariffs to all Chinese exports to the U.S., "he could further rattle markets, tip the economy toward recession and lose his best ticket to re-election."

"Pain is already building in key 2020 swing states in the Midwest, including Iowa

and Wisconsin, where retaliatory tariffs on soybeans, corn, sorghum and pork are slamming farmers," they write. "Steel and aluminum tariffs are also hitting industrial Midwest states critical to Trump's reelection, including Ohio and Michigan." A recent study commissioned by a group opposed to the tariffs estimates that an expanded trade war, with China's retaliatory tariffs factored in, could result in a net loss of 2.2 million jobs. More here.

CIVIL RIGHTS

TRUMP DOESN'T SUPPORT EQUALITY ACT: President Donald Trump opposes the Equality Act, H.R. 5 (116) , which would amend the Civil Rights Act of 1964 to clarify that the law's prohibition against discrimination based on sex extends to sexual orientation and gender identity, The Washington Blade's Chris Johnson reports. "The Trump administration absolutely opposes discrimination of any kind and supports the equal treatment of all," a senior administration official told the Blade via email. "However, this bill in its current form is filled with poison pills that threaten to undermine parental and conscience rights."

Trump's opposition to the Equality Act is a reversal from comments Trump made in a 2000 interview with The Advocate, Johnson points out. "It's only fair," Trump said at the time of amending the Civil Rights Act to include sexual orientation. The Equality Act may get a House floor vote as early as this week. More from Johnson here.

INSIDE THE AGENCIES

NIELSEN, VITIELLO CHALLENGED FAMILY ARREST PLAN: Former DHS Secretary Kirstjen Nielsen and former acting ICE Director Ronald Vitiello challenged a White House plan to arrest thousands of families before they were ousted from the department last month, Nick Miroff and Josh Dawsey report in the Washington Post.

The Post spoke with seven current and former DHS officials who said the purpose was "to send the message that the United States was going to get tough by swiftly moving to detain and deport recent immigrants — including families with children," Miroff and Dawsey write. Although Nielsen and Vitiello raised operational and logistical objections to the plan, they weren't opposed for ethical reasons.

White House senior adviser Stephen Miller and ICE Deputy Director Matthew Albence "were especially supportive" of the operation as a way to discourage incoming families, the Post reports. One former DHS official told Morning Shift that Nielsen and Vitiello weren't opposed, but wanted to be ready to defend the strategy in public. More from the Post here.

PAYDAY

FACEBOOK BUMPS CONTRACTOR PAY: "Facebook said Monday it will raise wages for its contractors in the U.S., followin g revelations of internal strife over working conditions for such staffers within the company," POLITICO's Cristiano Lima reports. The move will boost the social media giant's hourly minimum wage to $20 (up from $15) for contractors living in San Francisco, New York City, and Washington, D.C., and to $18 for those living in Seattle.

The announcement comes after the Washington Post last week reported on protests against "micromanagement, pay cuts, and inadeq uate counseling support" from the 15,000 Facebook contractors who monitor and remove violent content from the social media site. These content reviewers "will earn a minimum of $22 an hour in the Bay Area, New York and D.C.; $20 in Seattle; and $18 in all other metro areas in the U.S." according to Lima.

Google similarly announced last month that it will require its contractors to provide health benefits, a $15 minimum wage, and paid parental leave after more than 900 of its employees signed a letter pressing the company on its treatment of contract workers. More from Lima here.

IN THE COURTS

TRUMP FACES PAY DISCRIMINATION LAWSUIT: Omarosa Manigault-Newman, the former *Apprentice* star who worked for President Donald Trump's campaign and White House, "on Monday accused her former boss of pay discrimination in new court documents ," The Daily Beast's Olivia Messer reports. "Manigault-Newman's declaration specifically mentions Bryan Lanza, the former Trump for President deputy communications director and Trump Transition Team communications director, as someone 'whose work required substantially equal skill, effort, and responsibility as mine' but 'was paid more than me.'"

"According to FEC filings, Manigault-Newman was paid $28,000 for two

months of her services, while Lanza was paid about $62,000 for three months of consulting work," Messer reports. Manigault-Newman's claims were submitted with a "proposed collective-action lawsuit against Trump being spearheaded by former 2016 Trump campaign staffer Alva Johnson," who alleged in February that the campaign underpaid her on account of her race and gender and that Trump grabbed and forcibly kissed her. More here.

LAWSUIT CHALLENGES UNION HEALTH WORKER RULES: Five states filed a lawsuit in California federal court Monday challenging a new Trump-administration rule that prohibits states from allowing a portion of Medicaid payments to providers to be diverted automatically to unions that represent health care aides. The suit, filed by California, Connecticut, Massachusetts, Oregon, and Washington, challenges a Centers for Medicare and Medicaid Services rule finalized earlier this month. SEIU, the biggest union representing home health care workers, has said it will join in lawsuits to block the rule. Read the announcement from California Attorney General Xavier Becerra here. Read the complaint here.

EPSTEIN LAWSUIT UPDATE: A federal judge on Monday sided with Trump's DOJ in an effort to break a logjam over billionaire pedophile Jeffrey Epstein's 2008 plea deal, which was negotiated by then-U.S. Attorney Alexander Acosta and ruled illegal this past February by a distric t court judge, on the grounds that Epstein's victims were not made aware of the deal before it was approved.

Attorneys for Epstein's victims on Friday said that the government should propose a remedy for the victims. But on Monday, Marra ordered the victims' attorneys to file a proposed remedy within 30 days, saying it's up to them to make an opening bid. Critically, Marra also said there would be no more discovery in the case, limiting the possibility of more damaging disclosures about the Labor secretary's handling of the case. Read the Monday ruling here.

RULEMAKING

JOINT EMPLOYER COMMENT PERIOD: The Labor Department extended by 15 days the comment period for its proposed joint employer rule. The new deadline is June 25. More from POLITICO's Ian Kullgren here.

TAX CUTS AND JOBS ACT

TAX CUT, JOB CUTS: AT&T has cut 23,328 jobs since the Tax Cut and Jobs Act

was signed into law in December 2017, according to an analysis of the company's financial reports by the Communication Workers of America. AT&T CEO Randall Stephenson promised before the bill's passage that the company would add 7,000 jobs and pay "greater wages" if the bill became law. The CWA and the United Automobile Workers pressed Congress earlier this year to investigate how major corporations like General Motors and AT&T spent their windfalls from President Donald Trump's tax cut. "There are fewer jobs in parts of the business that are declining and facing technology shi fts," AT&T told Morning Shift in emailed statement. "Many union-represented employees have a job offer guarantee that ensures they are offered another job with the company if their current job is eliminated." Read CWA's analysis of AT&T's reports here.

JOBS, JOBS, JOBS

AMAZON'S STARTUP PITCH: Amazon announced Monday that it will offer employees up to $10,000 in startup costs if they quit the online retail giant to start their own Amazon delivery business, Joseph Pisani reports for the Associated Press. "The company says it will also pay them three months' worth of their salary." The move, which expands an existing program that previously offered the $10,000 only to military veterans, "is part of the company's plan to control more of its deliveries on its own, rather than rely on UPS, the post office, and other carriers," Pisani writes. So far, "more than 200 Amazon delivery businesses have been created since it launched the program last June."

Here's the rub: These employees-turned-independent-contractors, who "will be able to lease blue vans with the Amazon smile logo stamped on the side," might first want to read up on FedEx Ground drivers, who similarly work as independent contractors — and have frequently ended up suing FedEx alleging employee misclassification. Amazon did not respond to Morning Shift's request for comment. More here .

STATE OF THE LABOR MARKET FOR NEW GRADS: A new report out this morning from the left-leaning Economic Policy Institute looks at job prospects for the Class of 2019. Read it here.

Advertisement Image

COFFEE BREAK

— "Muslim women accuse Amazon of 'harassing and hostile' work conditions," from The Washington Post

— "Inside Jared Kushner's two mi ssions impossible," from POLITICO

— "Uber and Lyft Face Hurdle of Finding and Keeping Drivers," from The Wall Street Journal

— "Battles erupt over warehouse jobs as the Legislature moves to curb subsidies," from The Los Angeles Times

— "Uber and Lyft face new labor p ressure over public pensions," from POLITICO

— "Liberal watchdog group sues Commerce Department over Census citizenship question," from POLITICO

— "Sara Nelson's Art of War," from The New Republic

THAT'S ALL FOR MORNING SHIFT!

** **A message from NPWF and NWLC:** More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, which made it illegal to discriminate on the basis of pregnancy, childbirth or related medical conditions. It's time to clarify and strengthen existing federal protections for pregnant workers. Leading

companies understand that women's labor force participation is critical to the strength of companies, the growth of our economy and the financial security of modern families. Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce are urging Congress to pass the bipartisan Pregnant Workers Fairness Act as an important step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.**

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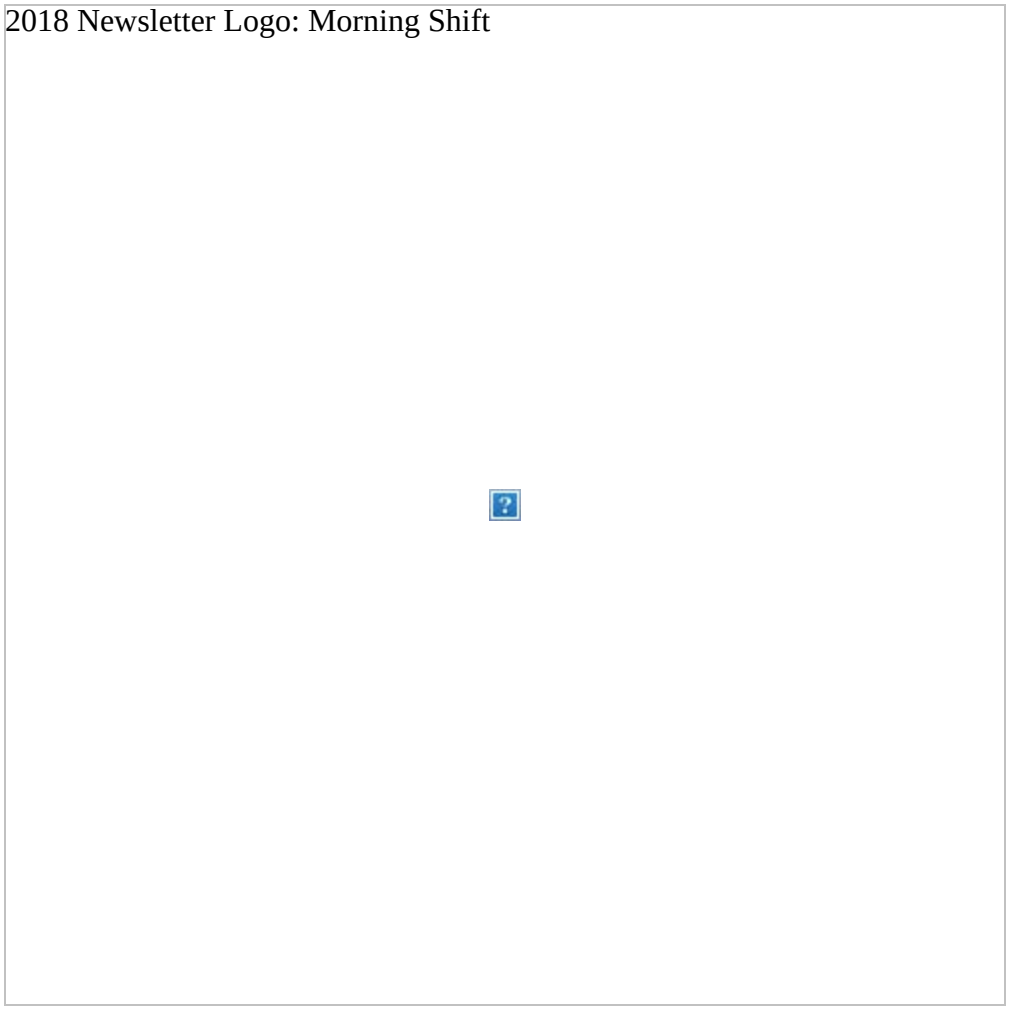

05/17/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ted Hesson

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— The biggest public employee unions are surprisingly flush one year after *Janus.*

— The House will vote today on a bill that would extend anti-discrimination protections to LGBT Americans.

— A federal court today will hear arguments on whether to block Trump's declaration that a national emergency allows him to spend unappropriated funds to build the border wall.

**** A message from NPWF and NWLC:** Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce urge Congress to pass the bipartisan Pregnant Workers Fairness Act as a step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.****

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DRIVING THE DAY

LIFE AFTER JANUS? NOT SO BAD: Nearly one year after the Supreme Court dealt public employee unions a severe financial blow in *Janus v. AFSCME* , a POLITICO review of 10 of the largest found them surprisingly flush, POLITICO's Rebecca Rainey and Ian Kullgren report. Although the high court shut off a crucial source of revenue — mandatory fees collected from union non-members to cover their share of collective bargaining costs —all but one of the unions reported more money at the end of 2018. (The union that reported less money, the American Federation of Government Employees, can't attribute it to *Janus* because AFGE represents federal employees, from whom unions were already barred from collecting mandatory fees.)

Collectively, the 10 large public employee unions that POLITICO surveyed lost 309,612 fee payers in 2018. Yet that group reported a combined gain of 132,312 dues paying members. Eight of the nine large unions that have filed full-year 2018 data with the Labor Department (AFT's financial information for all of 2018 is not yet available) reported financial gains totaling a combined $379,384,917. More from Rainey and Kullgren here.

POLITICO Pro DataPoint by Tucker Doherty

POLITICO Pro DataPoint

View the full DataPoint graphic here. Want to add DataPoint to your Pro account? Learn more.

ON THE HILL

VOTE ON EQUALITY ACT: The House is scheduled to vote today on the Equality Act, H.R. 5 (116), which would am end the Civil Rights Act of 1964 to clarify that the law's prohibition against sex-based discrimination extends to sexual orientation and gender identity. The Washington Blade's Chris Johnson reported earlier this week that the Trump administration plans to oppose the legislation, arguing the "bill in its current form is filled with poison pills that threaten to undermine parental and conscience rights."

But in a letter to congressional leaders Thursday, dozens of members of the business community, including the Chamber of Commerce, The National Association of Manufacturers, and The National Restaurant Association, urged lawmakers to pass the bill: "Our members recognize the value of equal opportunity because it enables them to attract and retain the most talented employees, better connect with their customers, and make their communities stronger and more inclusive." Read the letter here.

"All but one House Democrat, Rep. Dan Lipinski (D-Ill.), has already cosponsored the bill — and he too has said he'll vote for the measure — guaranteeing passage on the floor assuming Republicans don't succeed in attaching a poison pill," POLITICO's Sarah Ferris and Heather Caygle report. "The GOP procedural votes, known as motions to recommit, could force Democrats' most vulnerable members to go on the record on contentious issues," they explain. During a whips meeting Thursday one Democrat said "religious rights could be one of the GOP's targets." More from Ferris and Caygle here.

IN THE COURTS

EMERGENCY DECLARATION IN COURT: An Oakland-based federal court will hear a pair of challenges today to the February national emergency declaration that President Donald Trump used to justify his expenditure of $6.7 billion in unappropriated funds to build the border wall. One of the lawsuits, *Sierra Club et al. v. Trump*, was filed by the ACLU on behalf of the Sierra Club and a border advocacy coalition. The other case, *California v. Trump*, was filed by California and 19 other states. The House (which has filed a separate suit in D.C. federal court) will also present arguments at the hearing.

INSIDE THE AGENCIES

TRUMP'S CLAIRVOYANT ICE PICK: "Mark Morgan, the White House choice to

lead Immigration and Customs Enforcement, said during a Fox News interview earlier this year that he can judge the likelihood that an unaccompanied minor will become a gang member by looking into that child's eyes," POLITICO's Ted Hesson reports.

"I've been to detention facilities where I've walked up to these individuals that are so-called minors, 17 or under," Morgan said on "Tucker Carlson Tonight" in January. "I've looked at them and I've looked at their eyes, Tucker — and I've said that is a soon-to-be MS-13 gang member. It's unequivocal." The quotation resurfaced in a Huffington Post review of Morgan's public utterances.

Sanaa Abrar, advocacy director with the pro-migrant United We Dream, decried Morgan's "hateful rhetoric" and said it "hits close to home for many of our members ... who have been racially profiled and detained as a result of this administration's policies." But Morgan's comment wasn't so different from President Donald Trump's assertion one year ago, amid the family-separation crisis, that unaccompanied minors "look so innocent. They're not innocent." More here.

IMMIGRATION

TRUMP'S MERIT-BASED IMMIGRATION OVERHAUL: President Donald Trump's proposal to replace the country's immigration system with a "strict, point-based merit standard" would prioritize younger, highly educated, and "financially self-sufficient" immigrants to "contribute more to our social safety net," POLITICO's Jordyn Hermani reports. Trump also said the U.S. should crack down on asylum seekers. "If you have a proper claim, you will quickly be admitted. If you don't, you will promptly be returned home," Trump said. The plan **would not change** the net number of immigrants admitted to the U.S.

Notably missing from the proposal was any mention of E-Verify, whose expansion is the top priority for most immigration restrictionist groups. POLITICO's Ted Hesson and Anita Kumar reported last week that E-Verify might "become part of a separate legislative effort," but was included in recent White House discussions. Mark Krikorian, executive director of the restrictionist Center for Immigration Studies, a key White House ally, called the plan a "very positive effort" in a statement, but Krikorian also complained that "there was no mention of E-Verify" and that "it does not even call for a modest reduction in total immigration." More here.

Related: "Trump's new immigration plan may be DOA — but it's really about 2020," from POLITICO

SHARE OF FOREIGN BORN WORKERS TOPS RECORDS: The number of workers born outside the U.S., including those here temporarily and those who are now citizens, "accounted for 17.5 percent of all U.S. employees in 2018, up from 17.1 percent in 2017," Eric Morath reports for The Wall Street Journal. The share of foreign workers "has generally trended up in the past two decades amid slower growth of the native-born population," according to Morath, and 2018's numbers were the highest "since records began in 1996."

President Trump's hard-line immigration agenda and anti-immigrant rhetoric has not affected that trend, Jeanne Batalova, a senior policy analyst at the non-partisan Migration Policy Institute, told Morath. "It takes years for people to invest to come to the United States to join their families or for employment reasons," Batalova said. "They're not going to be dissuaded from that." More here.

DEMS AGREE TO BORDER FUNDING IN DISASTER PACKAGE: "Democratic leaders have agreed to fund a portion of the White House's emergency funding request to address the surge of migrants at the southern border," POLITICO's Sarah Ferris and John Bresnahan report. "Top Democrats indicated to Republicans late Thursday afternoon that they are willing to include some of the White House's $4.5 billion proposal — specifically for humanitarian assistance — in a long-stalled disaster relief package." But that does not include the additional requested funding for detention beds or the Immigration and Customs Enforcement agency. Trump has been pushing for his $4.5 billion request for additional immigration funding to cover costs related to the border crisis to be wrapped into the multi-billion disaster aid package. The legislation is slated for a Senate vote next week. More here.

MIGRANTS TO FLORIDA DEM STRONGHOLDS: President Donald Trump plans "to send potentially hundreds of undocumented immigrants each month" to Florida's Democratic strongholds of Broward and Palm Beach counties, POLITICO's Matt Dixon reports. "The decision was announced on Thursday, a month after Trump floated the idea of shipping undocumented immigrants to sanctuary cities that limit their cooperation with federal immigration enforcement."

"This is a humanitarian crisis. We will do everything possible to help these people," Broward County Mayor Mark Bogen, a Democrat, said in a statement. "If

the President will not provide us with financial assistance to house and feed these people, he will be creating a homeless encampment." Although none currently exist in the state, Florida's Republican-led legislature recently passed legislation to bar the state's municipalities from becoming "sanctuary" cities that limit cooperation with federal immigration officials. More from Dixon here.

PAYDAY

CEO PAY PEAKS AGAIN: Median pay for the CEO's of the largest U.S. companies set a "a fourth straight post-recession high" at $12.4 million in 2018, even though "stock-market returns tumbled at most of the companies," according to an analysis of S&P 500 corporate proxy statements by the Wall Street Journal's Theo Francis and Lakshmi Ketineni. "The number of women running S&P 500 companies continued to decline, with just 20 on the job all year, down from 22 the prior year." However median pay for the women CEOs, at $13.7 million, "was higher than for men." More here.

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COFFEE BREAK

— "AFL-CIO Budget Is a Stark Illustration of the Decline of Organizing," from Splinter News

— "White House says DACA pr otections too divisive to be included in Trump

immigration plan," from The Washington Post

— "New Colorado Law Deems Failure to Pay Wages a Theft," from Bloomberg Law

— "The "smarter" wall: how drones, sensors, and AI are patrolling the border," from Vox

— "These are the highest paying entry-level jobs, according to Glassdoor," from The Washington Post

— "No delays at Canadian border even after agents sent south, official says," from POLITICO

THAT'S ALL FOR MORNING SHIFT!

**** A message from NPWF and NWLC:** More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, which made it illegal to discriminate on the basis of pregnancy, childbirth or related medical conditions. It's time to clarify and strengthen existing federal protections for pregnant workers. Leading companies understand that women's labor force participation is critical to the strength of companies, the growth of our economy and the financial security of modern families. Adobe, Amalgamated Bank, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, Spotify and the U.S. Women's Chamber of Commerce are urging Congress to pass the bipartisan Pregnant Workers Fairness Act as an important step toward ensuring the health and financial security of pregnant and parenting workers. Learn more at npwf.info/business-pwfa.**

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05/13/2019 10 00 AM EDT

By IAN KU GREN ikul g en@po i ico com @ianku lg en)

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QUICK FIX

Former Vice President oe Biden's hawkish comments about the border may come back to haunt him

Union fi ings of unfair labor pract ce charges have fa len nearly 11 percent under rump; unions fear giving the NLRB a pretext to roll back protections

Overcrowd ng at the border is so bad in exas hat U S author ties are a rlif ing migrants elsewhere

GOOD MORNING! It's Monday May 13 and his is Morning Shift your da ly tipsheet on labor and immigration news. Send tips exclus ves and suggest ons to y@p l t th @p l t k llg @p l t and t h@p l t . Fo low us on Twitter at @R b R y @t h @I K llg and @T thyN h .

DRIVING THE DAY

B DEN'S BORDER WALL: "Joe Biden once spoke about jailing employers who hire 'illegals ' said sanctuary cit es shouldn t be allowed to v olate federal law and argued a fence was needed stop 'tons' of drugs com ng into the country from 'corrupt Mexico " CNN's Andrew Kaczynski reports.

" hen Sen Biden's past comments which he made in the run-up to and during the 2008 presidential race show an approach to the ssue . . that could run afoul of the party's more liberal w ng " Kaczynski writes. "It also shows how Biden's long record in government can at t mes provide a contrast to where the Democrat c Party has evolved n recent years."

Speaking to a South Carolina rotary club in November 2006 Biden called for a border fence and a system to pun sh American employers who knowingly hire undocumented imm grants. "Unless you do hose two things " he said "all the rest is window dress ng." More here.

UNIONS

UNFAIR LABOR PRAC ICE CHARGES PLUNGE: Union filings of unfair labor practice charges have fallen nearly 11 percent under President Donald Trump Bloomberg Law's Andrew Wallender and Hassan A. Kanu report citing NLRB data obtained via a Freedom of Information Act request. The reason does not appear to be that management is treating labor more fairly. Rather "un ons are worr ed the GOP-majority board w ll rule aga nst them or that their case could even become a vehicle for the NLRB to establ sh new legal precedents that would disadvantage workers with a s m lar case down the road."

Service Employees Interna ional Union Local 509 for example withdrew an organizing petit on last month for non-tenured faculty at Northeastern University for fear that the NLRB would rule these teachers "managerial workers" and herefore exempt from the National Labor Relations Act. "You have to be very careful " Communications Workers of America Pres dent Chris Shelton sa d at a labor event earlier this year according to he Bloomberg reporters. "We have just about stopped going to he NLRB to file unfa r labor practice charges because it backf res almost always now because of Trump's NLRB."

Dec in ng unfa r labor practice ilings are not new Wallender and Kanu expla n they've been declining since 2002. "But the downward trend has accelerated in the last two years.

Charges f led plummeted to fewer than 19 000 by he end of he 2018 fiscal year — a 43 percent drop compared with the 2002 peak. More here.

AT THE BORDER

' HE WORS I HAVE EVER SEEN I : "Overcrowding at Border Patrol stat ons in South Texas has become so acute in recent days that U S. author ties have taken the rare step of using a rcraft to relocate migrants to other areas of the border simply to begin processing them " the Washington Post's Nick Miroff reports.

" he first fl ght left McA len Tex. on Friday transferr ng deta nees to Border Patrol facilit es in Del Rio Tex. " M roff writes. "There are da ly fl ghts scheduled for the next several days with two planned for Tuesday according to o ficials who spoke on the cond tion of anonym ty to describe the operat ons."

" his is the worst I have ever seen it by far " one veteran border patrol agent in South Texas told Miroff.

U S au hor ties arrested more than 5 500 people a day for the past several days n a row accord ng to the Post and has more than 17 500 people n holding sites and tent c ties. That's a 30 percent increase from late March when DHS off c als said the system was at its "break ng po nt." More h .

Related read: "Democrats ask federal watchdog to examine 'unprecedented' imm gration backlog " from the Washington Post

ANO HER BRICK IN HE WALL: The Pentagon on Friday notif ed Congress that it plans to divert another $1.5 bil lion toward barriers along he U S.-Mex co border POLITICO's Connor O Brien reports.

he move comes after $1 billion was shifted toward the border from unspent Army personnel accounts n March O'Brien wr tes. "Act ng Defense Secretary Pat Shanahan unilatera ly shifted the funds n the face of oppos tion from top Democrats on Capitol Hill." More here.

CBP DEPLOYS MORE AGEN S O BORDER: CBP pl t g 86 g t f l p t th g k th t t y -k - h POLITICO S St ph B l y p t

CBP informed an av at on industry group that t w ll reroute he agents from var ous ports of entry to the southern border adding 300 that already have been diverted.

" he industry coa ition wants Congress to support the admin strat on's request for supplemental border security money to help ensure CBP doesn t need to divert more agents " Beasley wr tes. More here.

Related read: "Fact-checking the Trump administration's imm gration fact sheet " from h W h gt P t

IMMIGRATION

HUD PLAN WOULD DISPLACE 55K CHILDREN: "A plan by HUD to end housing assistance for undocumented imm grants would displace more than 55 000 ch ldren who are U S. citizens or legal res dents " POLITICO's Katy O'Donnell reports.

"Existing law bars HUD from providing financ al ass stance to undocumented immigrants. But accord ng to the way the rules work now a so-called mixed-status family — w th both citizen and non-c tizen members — can receive prorated housing aid if one of the members is an eligible citizen " O'Donnell writes. "The new rule would requ re every member of a family receiv ng aid to be an elig ble citizen."

About 25 000 famil es that receive subsidized housing have an neligible member and would risk evict on under the proposed rule according to a HUD staff analys s. More here.

JOBS, JOBS, JOBS

EN RY LEVEL NO MORE: Automation and outsourcing jobs have stripped rudimentary tasks from entry-level jobs present ng a cha lenge for new college graduates the Wall Street Journal's Lauren Weber and Ch p Cutter report.

" echn cal sk lls turn over fast so employers are looking for fast learners who can qu ckly evolve and have except onal soft skills — the ability to write listen and communicate effectively " Weber and Cutter report. "Your future employer may expect you to make sales calls on day one. You m ght be asked to prepare a client presentation your first week. In short order you could be handed the job of manag ng a pro ect." More here.

2020 WATCH

SANDERS ADV SER HAS CHECKERED PAS WI H UNIONS: "A senior adviser to Sen. Bernie Sanders and a member of the negot ating team that recently drafted his pres dent al campaign's sta f union contract was convicted n 2013 of embezzl ng funds from a steel workers un on " Kit Norton reports for VTDigger the Vermont-based invest gative reporting outlet.

he Sanders campaign last week announced it had ratified a union contract with campaign workers guarantee ng overtime pay rest breaks and time off. Charles Rocha a sen or adviser tweeted after the announcement that he was "proud to have been on the negotiating comm ttee."

"In 2013 Rocha was sentenced to two years probation and to pay a $2 000 fine for embezzl ng United Steelworkers Union funds " Norton writes. "Before plead ng gu lty to the embezzlement charge and be ng sentenced Rocha had already been ordered to pay $12 449 back to the union.

"Rocha llegally used un on money to buy $400 n Stanley Cup f nals t ckets. He also paid thousands of dollars for golf trips in South Carolina and Flor da between the end of 2008 and m dway through 2009 accord ng to court documents." More here. Read a 2016 report by POLITICO's Brian Mahoney about Rocha's embezzling convict on here.

COFFEE BREAK

— "Trump's trade agenda on the verge of mplod ng " from POLITICO

— "Push for a $15 Minimum Wage Div des Democrats " from he < a href="https //gcc01 safel nks.protection.outlook.com/?url=http%3A%2F%2Fgo polit coema l.com%2F%3Fqs%3D55212563e83a449ea46fe6ed90dbcd929ae5625a0caf2b4b0d2a9ace541a920e7074a8b155762af1fd5976a54bc17eeb&data=02%7C01%7C%7Ca6b572970ad24ac4f9f208d6d7ac0001%7C5e453ed8e33843bb90754ed5b8a8caa4%7C0%7C0%7C636933531063437036&sdata= 3W9OV3nvm%2FEhUr1ShqTXfX3Z0Re4A NWcFeGSqctDk%3D&reserved=0" originalSrc="h tp //go polit coemail.com/?qs=55212563e83a449ea46fe6ed90dbcd929ae5625a0caf2b4b0d2a9ace541a920e7074a8b155762af1fd5976a54bc17eeb" shash="Qz2nBcZMs2nRVejK/imAyMWUxLTwLRJp2ScavXJ7fvY/VzfMovgOVkVn5iNLpk/VHUW2LL2NsqwnC4wbLxcHMeCJy2E9BI1NkznfOonIdfqsKPytVJ Sfog UrfkuO 7 RIe6zcXrMSi Nh6llYEsKSZ0dNu HpyBkIW7zxU9W8=" target="_blank">Wall Street Journal

— "Anita H ll Let's Talk About How to End Sexual Violence " from the New York T mes

— "For Trump and some of h s supporters violence aga nst mmigrants appears totally acceptable " from the W h gt P t

— "She Stopped to Help M grants on a Texas Highway. Moments Later She Was Arrested " from the New York Times

— "Harvard Drops Harvey Weinste n Lawyer as a Faculty Dean " from the New York T mes

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Date: Thursday, May 2, 2019 10:04:00 AM

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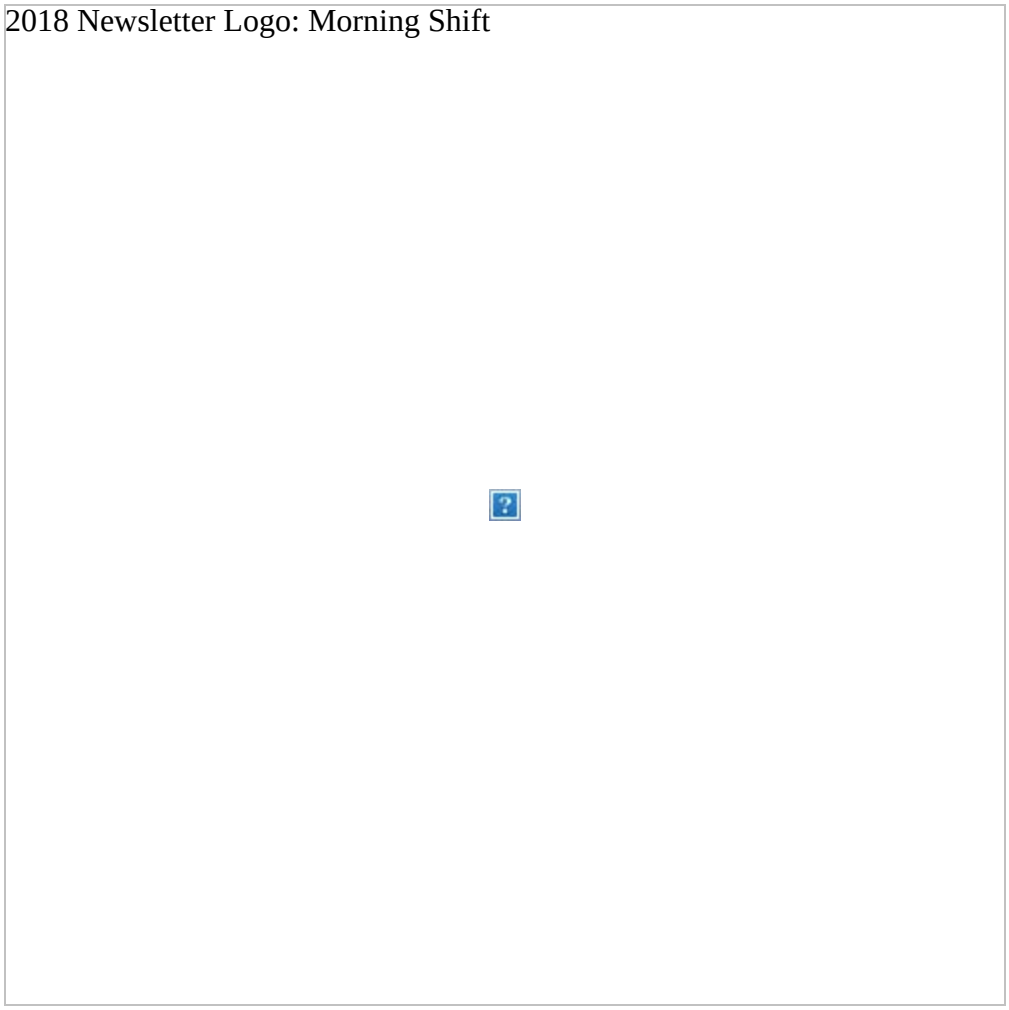

05/02/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ian Kullgren, Ted Hesson, Dan Diamond and Jeremy White

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— Top AFL-CIO officials have gone to war over a strip-club receipt.

— Another minor died in custody of the Office of Refugee Resettlement, the third within the past five months.

— Labor Secretary Alexander Acosta said Wednesday that a Survey Monkey poll used to justify revoking a child labor protection rule was "just one footnote." That's not true.

GOOD MORNING! It's Thursday, May 2, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

DRAMA WITHIN AFL-CIO TOP RANKS: A receipt from a Miami strip club has opened a rift inside the AFL-CIO, Hamilton Nolan reports for Splinter News. Late last month, AFL-CIO President Richard Trumka notified Executive Vice President Tefere Gebre that he was putting him on paid administrative leave while the labor federation investigated Gebre's expensing a $117.70 bill from Playmates, a Miami strip club. Gebre answered Monday by asking the AFL-CIO executive council to intervene, stating that only the 55-member body, and not Trumka, had the authority to investigate and remove him. The Playmates receipt, Gebre said, was submitted "erroneously" and was withdrawn without reimbursement.

The confrontation threatens to stir tension because, Nolan notes, Gebre "is the only person of color in the AFL-CIO's leadership." Randi Weingarten, president of the American Federal of Teachers, an affiliate of the AFL-CIO, told Morning Shift that she reviewed the letter and asked Trumka to convene a meeting of the executive council "as soon as possible." An AFL-CIO spokesperson told Morning Shift that it would not comment on internal matters. More here.

WORKERS SIT IN AS GOOGLE EXECS WALK OUT: Two members of Google parent company Alphabet's board, "one of the coziest and most stable corporate

boards in Silicon Valley," will leave in the wake of a lawsuit from the tech giant's shareholders that faults the board for approving large payouts to former executives who had sexual harassment allegations against them, The New York Times reports . Eric Schmidt, who gave up Alphabet's executive chairmanship in January 2018, and Diane Greene, who joined the board in 2012, will give up their board seats in June. According to the Times, "before the announced changes, seven of Alphabet's 11 directors had been on the board for more than a decade."

The lawsuit filed earlier this year by Google shareholders alleged that the tech giant violated its fiduciary duties when it approved million dollar payouts to former executives with knowledge of credible sexual harassment allegations against them. Some 20,000 Google employees walked out of their offices last year in response to a New York Times report that Google paid out $90 million to Andy Rubin, creator of Android software, even after concluding that reports that he coerced a female employee into performing oral sex were credible. On Wednesday, hundreds of Google employees staged a sit-in at their offices protesting claims from two employees that they were retaliated against for helping organize the walkout last year. Last week, an NLRB complaint alleging retaliation was filed against Google, although it was unclear who filed it. More on that from Bloomberg here.

Related: "Google workers protest 'culture of retaliation' with sit-in," from The Los Angeles Times

INSIDE DOL

ACOSTA BLAMES MEDIA FOR DATA CONTROVERSY: Labor Secretary Alexander Acosta on Wednesday pushed back against criticism that DOL used a Survey Monkey poll that had fewer than two dozen respondents to justify the proposed rollback of a child safety regulation. During a House Education and Labor hearing, Acosta was confronted by Rep. Pramila Jayapal (D-Wash.) about the poll (which prompted initiation of an inspector general review of DOL's rulemaking practices)."That is a newspaper article that made that assertion," Acosta said, "and if you were to actually read the underlying rule, you would note that that is in one footnote of a very large document," he said.

Wrong. DOL dedicated four lengthy sentences in the text of the notice of proposed rulemaking to describing the poll (bottom of page 48742, left column), which was conducted by the Massachusetts Department of Public Health's Teens at Work Project. The material was footnoted (twice, not once; see footnotes 34 and 35), b ut

the footnotes made no mention either of the tiny number of respondents or of the fact that the Massachusetts agency conducted its survey through Survey Monkey.

MORE FROM YESTERDAY'S HEARING:

— Acosta: "We do not support a change to the federal minimum wage at this time," from POLITICO
—"Acosta: PBGC should be able to set higher premiums for riskier plans," from POLITICO

IMMIGRATION

MIGRANT TEEN DIES IN HHS CUSTODY: The 16-year-old boy, who was from Guatemala, displayed no symptoms and voiced no health concerns when transferred April 20 from ICE custody to the Office of Refugee Resettlement, according to an HHS spokesperson. But the boy developed fever, chills, and a headache the following morning, precipitating a series of hospital visits across the next 10 days. He died in hospital intensive care on April 30.

Advocates for migrant families blasted the administration for what they say is a pattern of poor care. "The Trump administration turned this sixteen-year old boy's life into a devastating statistic: the third child to die in the care of US immigration authorities in the past five months alone," said Jess Morales Rocketto of Families Belong Together in a written statement. HHS officials said they are investigating the cause of death.

$4.5 BILLION FOR THE BORDER: "President Donald Trump on Wednesday asked Congress for $4.5 billion in emergency aid to address the surge of Central American immigrants at the U.S.-Mexico border," POLITICO's Sarah Ferris and Caitlin Emma report. The administration seeks $3.3 billion in humanitarian assistance -- a move that may receive bipartisan support. But Trump is also asking for $1.1 billion in border operations funds to add 23,600 shelter beds for unaccompanied minors, and that could be a non-starter for Democrats. (None of the funds would be used to build a wall.) HHS currently has 12,700 minors in custody, so it appears the Trump administration expects that figure to nearly double in coming months.

"The bottom line here is that the migration flow and the resulting humanitarian crisis is rapidly overwhelming the federal government's ability to respond," a senior administration official told reporters Wednesday. But Rep. Rosa DeLauro

(D.-Conn.), chair of the House Appropriations Labor-HHS subcommittee, said in a written statement: "I will not agree to additional funding that continues the use of HHS agencies to enforce immigration policy. That is not HHS's job." More here.

More details in the supplemental, according to a **related summary**:

— $342 million for ICE detention beds: ICE seeks funding for a yearly average of 54,760 detention beds, a sharp increase from the 45,274 beds funded in a February spending package.

— $273 million to fund migrant processing centers: CBP would use the funds to build or upgrade five centers in Texas and Arizona: three tents, one modular facility and one renovated facility.

— $107 million for Border Patrol retention and training: The agency would devote $84 million to agent retention, a chronic problem at the low-morale workplace. In addition, $23 million would be used for a pilot program to train agents to conduct "credible fear" interviews, the first step of certain asylum claims.

— $59 million for volunteer force: Former Secretary Kirstjen Nielsen in March called on DHS employees to volunteer at the border. These funds would partly pay for that effort, which attracted nearly 1,700 people, according to the funding summary.

IN OTHER BORDER NEWS: "DHS to subject some families at border to DNA tests," from POLITICO's Ted Hesson

JOBS, JOBS, JOBS

GIGGITY: So far at least two states have rebuffed DOL's opinion letter issued earlier this week that concluded w orkers deployed by smartphone-based apps are independent contractors and not employees under the Fair Labor Standards Act. In a statement posted Wednesday to the New Jersey Department of Labor Twitter account , state Labor Commissioner Robert Asaro-Angelo said the opinion letter "has zero effect" on how New Jersey enforces its labor laws. Asaro-Angelo clarified that under state law "a worker is presumed an employee, unless the putative employer can satisfy each element of the statutory three-part test for independent contractor status." DOL cited a six-part test in its opinion letter to determine the degree to which

a worker is economically dependent on an employer.

Meanwhile, California is considering legislation to codify the "ABC test" in the California Supreme Court 2018 Dynamex ruling, which compels businesses in the state to reclassify many contractors as employees. Tech firms are angling for carve-outs, but California Assemblywoman Lorena Gonzalez and labor allies show no inclination to grant any. California Labor Federation spokesperson Steve Smith said the DOL opinion letter, along with other "Trump attacks on workers," strengthens the argument for the state legislature to codify Dynamex. California Governor Gavin Newsom administration's stance, via California Labor and Workforce Development Agency Secretary Julie Su: "In California, there is a presumption that a worker is an employee." Read the DOL opinion letter here.

FEDS

NO CUT TO INTEREST RATES: Rebuffing requests from President Donald Trump and White House economic adviser Larry Kudlow, Federal Reserve Chairman Jerome Powell on Wednesday said the central bank doesn't see "a strong case" for moving interest rates "in either direction," POLITICO's Victoria Guida reports. "Powell said the central bank believes that inflation, which has been coming in below the Fed's 2 percent target, is being held down by 'transient' factors, such as portfolio management services, lower apparel prices and airfares," Guida writes. "That means the Fed still thinks it can sit back and have inflation move back up toward 2 percent without needing to give it an extra boost." More here.

CIVIL RIGHTS

EQUALITY ACT CLEARS COMMITTEE: The House Judiciary Committee on Wednesday voted along party lines, 22-10, to app rove the Equality Act, H.R. 5 (116). The legislation would amend the Civil Rights Act of 1964 to clarify that the law's prohibition against discrimination based on sex extends to sexual orientation and gender identity. The bill no w heads to the floor.

INSIDE THE AGENCIES

ANOTHER ONE BITES THE DUST: Homeland Security Department chief of staff Miles Taylor is leaving that post, POLITICO's Ted Hesson and Daniel

Lippman report. Taylor — who has held the role only since February — follows a recent exodus of senior officials at the department, including Secretary Kirstjen Nielsen and Secret Service Director Randolph Alles. More here< /a>.

COFFEE BREAK

— "How to keep the robots from taking jobs," from The Agenda

— "Apple is spending even more of its huge tax cut on Wall Street s tock buybacks," from Vox

— Opinion "Alabama Is More Pro-Immigrant Than You Think," from The New York Times

— "Harvard grad student union stages sit-in over labor dispute," from The Associated Press

— "For Lower-Paid Workers, the Robot Overlords Have Arrive d," from The Wall Street Journal

— "Joe Biden's message to Donald Trump: I'm no socialist," from The Washington Post

—"'Every Day I Fear': Asylum Seekers Await Their Fate in a Clogged System," from The New York Times

— "Liberal groups urge colleges to shun Trump of ficials tied to family separation," from POLITICO

THAT'S ALL FOR MORNING SHIFT!

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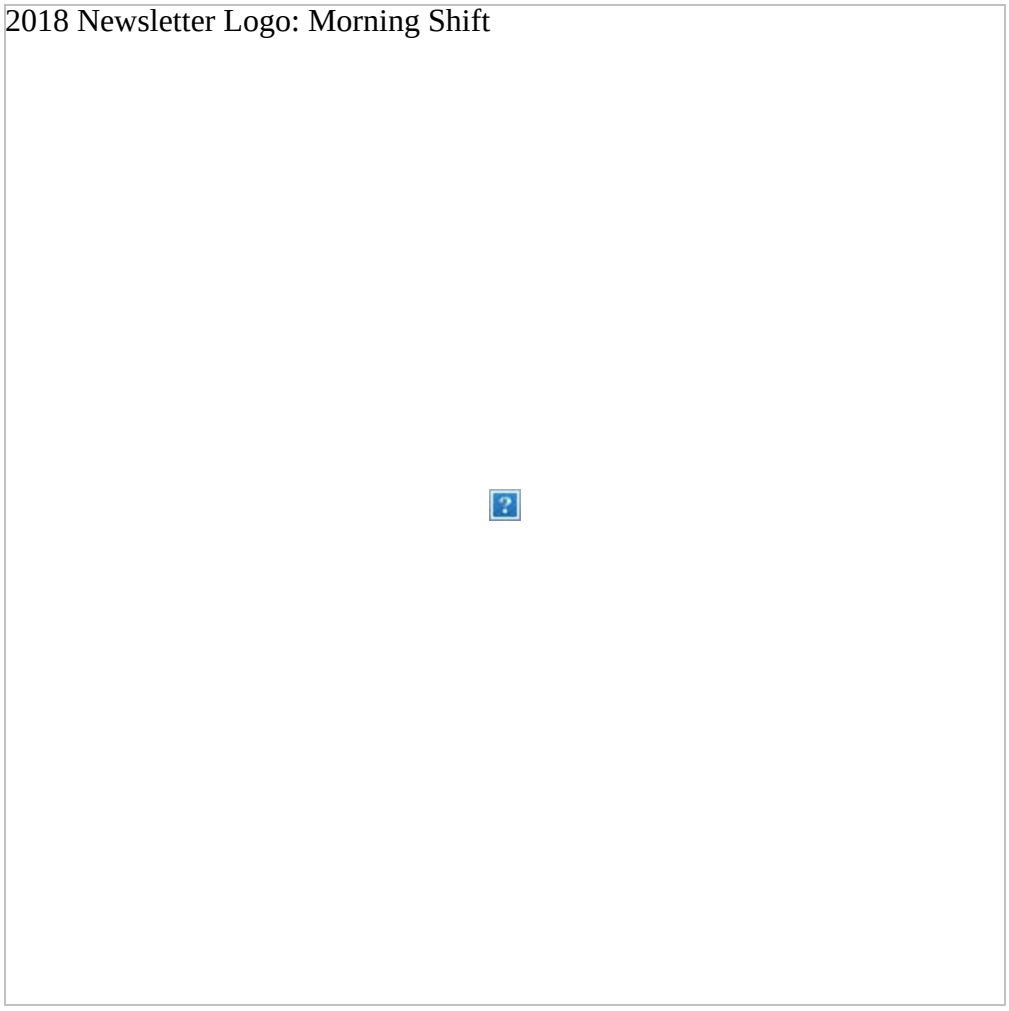

05/03/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— Democrats' plans to hurry the Dream Act along hit a snag.

— California's highest court applied the state's strict new employee-misclassification test retroactively.

— White male union members may be the key swing vote in 2020.

GOOD MORNING! It's Friday, May 3, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

DREAMER DELAY: House Democrats scuttled their plan to advance next week the Dream Act, H.R. 6 (116) — which protects so-called Dreamers brought to the U.S. as children — over intra-party disagreement about whether undocumented people with criminal records should be eligible for citizenship, POLITICO's Heather Caygle and Sarah Ferris report. "Always issues when it comes to immigration, but we'll get through it," House Majority Whip Jim Clyburn said in a brief interview after attending a meeting with the Congressional Hispanic Caucus on Thursday. "I hope it'll get to the floor."

The legislation is on hold while Democrats scramble to draft language that can win support from pro-immigration advocacy groups and from key committee members. At issue is a section of the bill that would allow undocumented immigrants to commit three misdemeanors before being disqualified from seeking citizenship. More here.

JOBS, JOBS, JOBS

GIGGITY GIGGITY: A federal appeals court said Thursday that California's stringent "ABC" legal test, which makes it harder for businesses to classify workers as independent contractors rather than employees, applies retroactively, paving the way for thousands of gig workers to sue their bosses, POLITICO's Ian Kullgren reports. "The California Supreme Court last year ruled in *Dynamex Ops. W. Inc. v. Superior Court* that businesses must prove three things to classify workers as

contractors: that the worker is free from control of the employer in terms of their work performance; that the worker provides a service outside the employer's normal business; and that the worker is 'customarily engaged in an independent business' that matches the type of work being performed." The appeals court, in its decision Thursday, cited California courts' "legal tradition" of retroactivity.

The decision rebuffs a DOL opinion letter issued earlier this week that concluded workers deployed by smartphone-based apps are independent contractors and not employees under the Fair Labor Standards Act, citing a six-part test to determine the degree to which a worker is economically dependent on an employer. The state legislature is considering legislation to codify the ABC test.

"California businesse s were already drowning in high taxes and labor costs, and the 9th Circuit just saddled them with a load of bricks," Matt Haller of the International Franchise Association said in a statement. "Short of legislative relief or intervention by the U.S. Supreme Court, California's 76,000 franchise hotels, gyms, restaurants, and retail stores will live in legal uncertainty for the foreseeable future." More from Kullgren here.

2020 WATCH

THE LABOR VOTE IN 2020: "The union vote could be key in both the primary and the general election," FiveThirtyEight's Nate Silver predicts, noting that Hillary Clinton's comparatively weak performance among union members in the 2016 general election boosted Trump in several swing states. Clinton won a majority of union voters, as Democrats typically do, but only by 17 percentage points (compared, for instance to Barack Obama's 34-point margin in 2012; Morning Shift is rounding Silver's figures). "That roughly 18-point swing was worth a net of 1.2 percentage points for Trump in Pennsylvania, 1.1 points in Wisconsin and 1.7 points in Michigan based on their rates of union membership — and those totals were larger than his margins of victory in those states."

Silver takes care to note that Clinton's poor showing wasn't entirely attributable to white male union members, but that was the union subgroup that flipped entirely to favor Trump, 53-41. Small wonder, then, that Joe Biden's endorsement Monday from the International Association of Fire Fighters, a union that's heavily white and heavily male — and that couldn't bring itself to endorse either Clinton or Trump in 2016--made President Donald Trump pretty squirrelly. On Wednesday the president retweeted nearly 60 items meant to undermine the endorsement, and

himself wrote in one tweet : "I've done more for Firefighters than this dues sucking union will ever do, and I get paid ZERO!" More from Silver here.

JOBS REPORT

IT'S JOBS DAY: Economists surveyed by Econoday predict BLS will report this morning that 180,000 new jobs were cre ated in April, slightly lower than the March rebound of 196,000 new jobs. They forecast unemployment to remain 3.8 percent. The private payroll company ADP was much more confident, reporting 275,000 new private-sector jobs in April. "The job market is holding firm, as businesses work hard to fill open positions," Mark Zandi, chief economist of Moody's Analytics, said earlier this week. "The economic soft patch at the start of the yea r has not materially impacted hiring." At 8:30 a.m. you can find BLS's April jobs numbers here.

UNIONS

NEW RULE BLOCKS HOME HEALTH WORKER PAYMENTS TO UNIONS: The Centers for Medicare and Medicaid Service issued a rule Thursday that prohibits states from allowing a portion of Medicaid payments to providers to be diverted automatically to unions that represent health care aides, POLITICO's Alice Miranda Ollstein reports. "The workers can now opt to have union dues deducted from their paychecks or make contributions to a retirement fund." Leslie Frane, executive vice president of the Service Employees International Union, the biggest union representing home health care workers, said her organization will join in lawsuits to block the rule.

Conservative groups such as the the National Right to Work Foundation (which brought the landmark *Janus v. AFSCME* suit) and the Freedom Foundation have been fighting to halt automatic union deductions. A group of Minnesota home-based care providers backed by NRTWF petitioned the Supreme Court late last year to challenge a Minnesota state law that permits home care workers for Medicaid recipients to unionize. "This move by the Trump administration will put as much as $150 million per year back in the pockets of families who need it most," Ashley Varner, Vice President of Communication for the Freedom Foundation said in a statement. More from POLITICO here. Read the rule here.

DEMOCRATS INTRODUCE MAJOR LABOR BILL: House and Senate Democrats introduced the "Protecting the Right to Organize Act " Thursday, a sweeping bill

that would strengthen collective bargaining rights and increase penalties to employers when they violate labor laws, POLITICO's Rebecca Rainey reports. The bill, introduced with 140 House and Senate co-sponsors, would, among other things, permit the NLRB to level monetary fines against employers that terminate a worker wrongfully or that, in violating the National Labor Relations Act, cause a worker to suffer economic harm. "There are currently no meaningful penalties for predatory corporations that use unlawful tactics to discourage workers from organizing a union," said Education and Labor Chairman Bobby Scott (D-Va.), who introduced the legislation in the House. More here.

DIVERSITY

EEOC COULD GET A QUORUM: Cloture was filed Thursday on the nomination of Janet Dhillon to serve as a member of the Equal Employment Opportunity Commission, teeing up a full Senate vote next week. Her confirmation would give the EEOC a quorum for the first time since early January. The Senate HELP committee cleared Dhillon's nomination along party lines in February, after it failed to advance in 2017 and 2019. Testifying before the committee in 2017, the corporate attorney said she would focus on clearing the commission's case backlog and cutting the number of new lawsuits filed by the EEOC. She called litigation a "last resort" and conciliation measures a "win-win for all ."

AT THE BORDER

HOW REMAIN IN MEXICO WORKS: As the Trump administration has expanded the number of non-Mexican asylum seekers it compels to wait in Mexico while their U.S. asylum cases are pending, asylum officers are growing "increasingly uncomfortable with their role in the process" and have complained to their union, Vox's Dara Lind reports. In interviews, members of the asylum officers' union said "decisions to let an asylum seeker stay are often reviewed — and blocked or overturned — by asylum headquarters."

"For decades, officers made judgment calls on whether a person could stay in the US to await an asylum hearing," Lind explains. But, under the policy, formally known as the "Migrant Protection Protocols," officers say they no longer have that authority. "I'm not adjudicating that case. It's like someone else sticking their hand inside me, like a glove," an officer told Lind. The 9th Circuit temporarily paused a lower court's preliminary injunction blocking Trump's "remain in Mexico" policy

last month as it reviews the administration's appeal of the ruling. More from Lind here.

CHANGES AT CBS: "CBS News is set to announce sweeping changes to its two major news programs as early as next week," the Huffington Post's Yashar Ali reports. "The latest shake-up means CBS News will for the first time have a woman as president and likely both of its major daily news programs anchored by women." The changes come just over two months after Susan Zirinsky took over as president of the news division, where she "has pledged to do a top-to-bottom overhaul after two years of tumult at the network." More from the Huffington Post here.

COFFEE BREAK

— "Teachers union embarks on 2020 primary endorsement process," from POLITICO

— "Trump signs ambitious EO to strengthen federal cyb er workforce," from POLITICO

— "Shanahan orders clampdown on sexual assault, harassment," from POLITICO

— "Foxconn Chairman Heads to Wisconsin After Meeting With President Trump," from The Wall Street Journal

— "Trump Fed pick Stephen Moore withdraws amid GOP opposition," from POLITICO

— "Where the Good Jobs Are," from The New York Times

— "For black Americans, experiences of racial discrimination vary by education level, gender," from Pew Research Center

— "Trump strengthens prote ctions for religious health workers," from POLITICO

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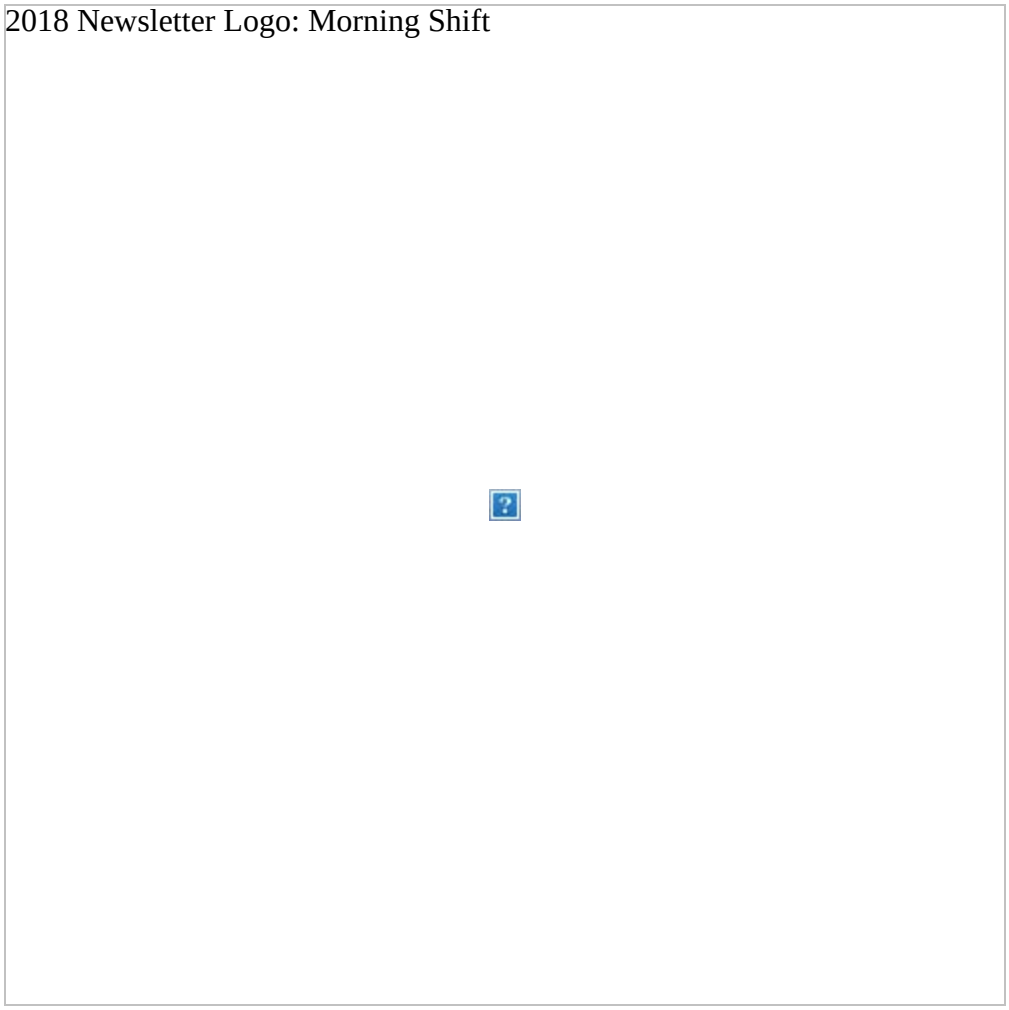

05/06/2019 10:00 AM EDT

By TED HESSON (thesson@politico.com; @tedhesson)

With help from Rebecca Rainey and Timothy Noah

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QUICK FIX

— An NLRB memo will ease the path for union non-members to challenge dues.

— Trump nominated former Border Patrol Chief Mark Morgan to lead ICE.

— The Trump administration appealed a decision related to EEOC pay data collection.

GOOD MORNING! It's Monday, May 6, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

UNIONS

EASIER PATH TO CHALLENGE UNION DUES: A memo issued Friday by NLRB General Counsel Peter Robb will make it easier f or union non-members to challenge the mandatory collection of union dues, Bloomberg Law's Robert Iafolla reports.

The memo states "that workers who object to paying for particular union expenditures don't have to explain why they shouldn't have been charged and give the agency evidence or investigative leads to support their allegations," Iafolla writes. "Prior general counsels had called on workers to provide such information."

"Robb's memo is another sign that he's strongly interested in the NLRB policing union misconduct," Bloomberg reports. More here.

NLRB HALTS VOLKSWAGEN VOTE: The NLRB on Friday put the brakes on a unionization vote at the Volkswagen plant in Chattanooga, Tenn., POLITICO's Ted Hesson reports. The board didn't offer an explanation for suspending proceedings related to the vote. It would have been the Chattanooga plant's third vote in five years on whether to unionize. More here.

IMMIGRATION

TRUMP TAPS MORGAN FOR ICE: In a strange twist, President Donald Trump announced Sunday that he will nominate former Border Patrol Chief Mark Morgan to become ICE director. Trump called Morgan "a true believer and American Patriot" in a tweet. Morgan ran Border Patrol in the final months of the Obama administration, but abruptly left his post in January 2017, shortly after Trump took office. Morgan told senior Border Patrol officials at the time that he had been pushed out by the incoming administration.

The National Border Patro l Council — a union closely aligned with Trump — clashed with Morgan during his short tenure atop the agency. In a November 2016 Breitbart op-ed, two members of the union's executive board called Morgan "a disgrace to the Border Patrol" who "does not have the will necessary to secure the border." But Brandon Judd, the union president, told Morning Shift Sunday that Morgan — who also was an FBI assistant director — would be a good fit for ICE. "To get someone that has the investigative background that Morgan has to take over an agency like ICE is a big win," Judd said.

The move comes as Trump revamps Homeland Security leadership. The White House in April pulled its previous ICE nominee, Ronald Vitiello, as part of a broader shakeup. Vitiello was a former Border Patrol chief, too. Trump tweeted later Sunday that Matthew Alben ce will remain as acting director pending Morgan's confirmation. More from POLITICO here.

WAGES

DOJ APPEALS EEOC DECISION: The Justice Department on Saturday appealed a district court judge's decision to allo w Obama-era changes to an EEOC employer survey to go into effect. The judge — D.C.-based Tanya Chutkan — ruled in March that the White House budget office hadn't followed proper regulatory procedure when it canceled the changes. The ruling meant businesses with 100 or more employees would be required to submit pay data to the EEOC broken down by race, ethnicity and gender. The appeal now sends the case to the D.C. Circuit.

LABOR

AFL-CIO COUNCIL MEETS OVER DISPUTE: Nearly a dozen members of the AFL-CIO executive council will hold a call today to discuss whether President Richard Trumka has the power to suspend Tefere Gebre — an executive vice

president and the federation's third highest-ranking official — over an attempt to expense a strip club bill, a source familiar with the meeting told Morning Shift. An AFL-CIO spokesman confirmed Sunday that members of the executive council would hold a call, but said its purpose wasn't to delve into the dispute.

Trumka placed Gebre on paid leave in late April over the matter, Splinter News' Hamilton Nolan reported last week. Gebre argued ag ainst the suspension in a letter to the executive council, saying he had submitted the receipt in error and withdrew it when he realized the mistake. Two unions that represent AFL-CIO employees backed Gebre in a related missive made public on Friday. More on the letter from Hamilton Nolan here.

CARD CHECK RIDES AGAIN: House Democrats included a versi on of "card check" in the sweeping labor legislation they introduced last week, H.R. 2474 (116) . A provision in the bill states that if an employer is found to have interfered with an election, workers can vote in the union by turning in union authorization cards. If a majority of those in the proposed bargaining unit signs the cards, the employer must bargain with the union, according to a summary of the bill.

The 1935 National Labor Relations Act (which became the foundation for modern labor law) initially allowed workers to unionize through card check. But the 1947 Taft-Hartley amendments to the law ended unionization by card check, except when management agreed not to oppose the union; otherwise, workplaces could be organized only through a secret-ballot election process overseen by the NLRB.

Labor pushed hard to win back card check elections in the 2000s, but didn't succeed. In June 2007, a card check bill that had passed in the House, H.R. 800 (110), failed to clear a procedural hurdle in the Senate in 51-48 vote along partisan lines. Former President Barack Obama didn't strongly press for a card-check bill during his presidency, which caused tensions with labor unions. The scaled-back card check provision in the latest House bill suggests Democrats haven't given up on it entirely.

COMING THIS WEEK

Labor bill markup: The House Appropriations Committee will mark up a fiscal year 2020 spending bill Wednesday that provides funds for the departments of Labor, HHS and Education. The markup takes place at 10:30 a.m. in Rayburn

2359. More here.

Focus on labor reform: A House Education and Labor subcommittee will hold a hearing Wednesday on the Democrats' labor reform bill, H.R. 2474 (116). The hearing takes place at 2 p.m. in Rayburn 2175. More here.

Digging into the border crisis: A Senate Judiciary subcommittee will hold a hearing Wednesday that examines the influx of migrants at the U.S.-Mexico border. Among the witnesses will be Manuel Padilla, a Border Patrol official and director of a Trump-created border task force. The hearing takes place at 2:30 p.m. in Dirksen 226. More here.

DHS budget hearing: A House Homeland Security subcommittee will hold a hearing Thursday on Trump's fiscal year 2020 budget request. Last week, the White House called on Congress to pass an emergency $4.5 billion-supplemental spending bill to cover costs related to the border crisis and other enforcement actions. The hearing takes place at 2 p.m. in Cannon 310. More here.

DETAINING ASYLUM SEEKERS: A recent decision by Attorney General William Barr to eliminate bond hearings for asylum seekers has set up a legal showdown in *Padilla v. ICE* , a case before a federal judge in Seattle.

The judge ruled in early April that a class of asylum seekers must receive pr ompt bond hearings where they can petition for their release. But a week later, Barr issued a decision that said detained asylum seekers weren't eligible for bond hearings. He delayed the effective date of his decision for 90 days to give DHS time to plan for increased detentions.

Following Barr's order, DOJ moved to vacate the Seattle judge's ruling, arguing it was "premised on an incorrect understanding" of the relevant federal laws. The plaintiffs — represented by the ACLU and other groups — countered with an amended complaint Friday that seeks to block the application of Barr's order to detained asylum seekers.

The legal standoff means it will be a case to watch in the coming weeks.

TRAVEL BAN FIGHT CONTINUES: A Greenbelt, Md.-based federal judge refused Thursday to dismiss claims that Trump's travel ban violates religious and due process protections in the Constitution. The decision allows three consolidated lawsuits against the ban to move forward. The cases were remanded to the district

court following the Supreme Court's decision to uphold the ban in June.

COFFEE BREAK

— "Bodies in the borderlands," from the Intercept

— "Harvard Harassment Case Brings Calls for External Review and Cultural Change," f rom the New York Times

— "Australian Taxi Drivers Sue Uber Over Wages They Say Its Arrival Cost Them," from the New York Times

— "In a Tight Labor Market, Gig Workers Get Harder to Please," from the Wall Street Journal

— "Administration Backs Plan for More Visas for Seasonal Workers," from the Wall Street Journal

— "World Governments Test Minimum-Wage Raises," from the Wall Street Journal

— Opinion: "A Century Ago, America Built Another Kind of Wall," from the New York Times

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Date: Tuesday, May 7, 2019 10:04:05 AM

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2018 Newsletter Logo: Morning Shift

05/07/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— GOP senators will be briefed today at the White House about Jared Kushner's immigration plan.

— The Machinists union is giving its members more say in its presidential endorsement process.

— Education Secretary Betsy DeVos said Monday that teachers' strikes "hurt kids."

GOOD MORNING! It's Tuesday, May 7, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

JARED'S TURN ON IMMIGRATION: Republican Senators go to the White House today for a briefing on Jared Kushner's soon-to-be-released immigration plan, POLITICO's Anita Kumar reports. The plan, Kumar writes, is "expected to boost security at the southern border and implement a merit-based system for immigrants." Kushner, who has been working on the plan for months, "is considering increasing the number of migrant workers allowed into the country while simultaneously reducing the number of family members that U.S. citizens and legal permanent residents are allowed to sponsor." Sen. Lindsey Graham (R-S.C.), chairman of the Senate Judiciary Committee, and Sens. David Perdue (R-Ga.), Mike Crapo (R-Idaho), and Chuck Grassley (R-Iowa) are expected to attend. More here.

GEBRE REINSTATED : Tefere Gebre, the AFL-CIO executive vice president who was suspended by AFL-CIO president Richard Trumka over an attempt to expense a $117 strip-club bill--he says it was an error--has been reinstated, Hamilton Nolan reports for Splinter. Nearly a dozen members of the AFL-CIO executive council held a call Monday to discuss whether Trumka had the power to suspend Gebre, who is the federation's third highest-ranking official and, Nolan writes, "the only high-ranking officer in the AFL-CIO who is a person of color." According to Nolan, "by the end of the meeting, Gebre's suspension had been lifted ... he is now allowed

to return to work."

"It is unclear whether Ge[b]re's reinstatement amounts to an exoneration in the investigation, or whether the AFL-CIO will recommend any further punishment," Nolan writes. "What is clear is that this case is now serving as a proxy for larger philosophical and political disagreements that are rife within the organized labor world, and that manifest themselves in the AFL-CIO's boardroom." More here.

2020 WATCH

MACHINISTS ALTER PRESIDENTIAL ENDORSEMENTS: The International Association of Machinists and Aerospace Workers announced a new endorsement process Monday that allows rank and file members to weigh in before the top brass do. "Leaders of the union's political arms in each state will then weigh in based on the members' picks," POLITICO's Ian Kullgren reports. "After Super Tuesday, the union will make an endorsement in both primaries with the blessing of the national executive council."

"IAM's new system will likely prompt the primary field to alter its approach to winning support from the union's 550,000 current and retired members," Kullgren explains. In 2016, the Machinists endorsed Hillary Clinton more than a year before the election, prompting backlash from Sanders supporters. More from Kullgren here.

UNIONS

DEVOS SAYS STRIKES ARE BAD FOR KIDS: Education Secretary Betsy DeVos took some shots at the labor movement Monday, saying that teachers' strikes "hurt kids," and criticizing the $400,000-plus salary paid to American Federation of Teachers President Randi Weingarten, POLITICO's Nicole Gaudiano reports. Great teachers should make "at least half as much" as Weingarten, DeVos said during an interview on stage with New York Times reporter Erica Green at the Education Writers Association National Seminar in Baltimore.

"I think teaching ... should be a highly honored and respected profession," DeVos said. "It's been deprofessionalized in many ways." In response to questions about recent teachers' strikes, DeVos said "I think it's important that adults have adult disagreements on adult time, and that they not ultimately hurt kids in the process." More here.

More on teachers' strikes: "Sacramento mayor backs 2020 parcel tax amid potential teacher strike," from POLITICO.

UNION BUSTING AT SSA?: More than 150 members of Congress urged the Social Security Administration to halt "anti-labor" tactics during contract negotiations, including evicting the union from its offices and confiscating computers and other equipment used by union representatives, POLITICO's Ian Kullgren reports. "The lawmakers accused SSA management of ignoring a federal court order blocking President Donald Trump's 2018 executive orders that sought to limit the power of federal government employee unions." More here .

SEIU HEADS TO KAISER'S FRONT LAWN: Hundreds of healthcare workers will gather outside Kaiser Permanente's national headquarters in Oakland, California, later today to protest the company's plans to eliminate 63 jobs at various facilities across Northern California. According to a press release from SEIU-United Healthcare Workers West, the company plans to lay off 63 gardeners and yards keepers on June 7 and to "outsource" the work to a contract workers who are "paid less and receives fewer benefits than current Kaiser employees."

VISA UPDATE

MORE H-2B VISAS: The Trump administration will issue up to 30,000 additional H-2B visas this fiscal year (which ends Sept. 30) for seasonal, non-agricultural guest workers, POLITICO's Ted Hesson reports. The visas, which are used widely in the landscaping, housekeeping, and construction industries, will be made available to "returning workers" who were previously granted H-2B visas in fiscal years 2016, 2017, or 2018.

The Labor Department supplies 66,000 H-2B visas per year, but DHS is authorized to issue more when demand is high. In 2017 Homeland Security Secretary John Kelly added 15,000 H-2B visas, and in 2018 his successor, Kirstjen Nielsen, did the same. This year's addition of 30,000 extra visas doubles the stakes, and Sen. Tom Cotton (R.-Ark.), an immigration hard-liner and close ally of President Donald Trump, is not pleased. "Allowing an additional 30,000 seasonal workers into the country forces Americans to compete for jobs against non-citizens who drag down wages," Cotton said Monday, according to POLITICO's Burgess Everett. More here from Hesson and here from Everett. Click here to read the announcement.

AT THE BORDER

THE LATEST BORDER BATTLE: The White House's request for an additional $4.5 billion in humanitarian assistance for migrants held at U.S. facilities along the border puts Democrats in a tough corner, POLITICO's Sarah Ferris and Heather Caygle report. "So you create chaos, and then ask for more money?" Rep. Katherine Clark (D-Mass.), vice chair of the House Democratic Caucus, told Ferris and Caygle. But Rep. Henry Cuellar, a moderate Democrat who represents a district on the Texas-Mexico border, told them: "Not that we're trying to validate or not validate [Trump's claim that there's a border crisis], there are a lot of people there at the border." Cuellar added: "I don't call it a security crisis, I call it a humanitarian crisis. So the question is how do we get to address that?"

The White House has requested more money for food, water, and medical care to handle a situation officials describe as "unlike anything we've ever seen." But "Democrats say the Department of Homeland Security's own policies have undermined their faith, especially as officials have quietly continued s eparating some families at the border," Ferris and Caygle write. More here.

GAMERS AREN'T PLAYING: Workers at Riot Games, the video game developer known for "League of Legends," walked out of its Los Angeles headquarters Monday "to protest the company's handling of two sexual discrimination lawsuits," Sam Dean reports for the Los Angeles Times. The move, "the first of its kind in the video game industry, comes amid a surge in tech worker activism and a growing interest in unionization."

Five current and former Riot Games employees have recently filed lawsuits alleging gender-based discrimination, retaliation, and harassment, according to Dean. Workers began organizing the walkout after Riot Games filed to have two of the cases moved to arbitration. The company last week announced it would give new hires the option to opt out of mandatory private arbitration for sexual harassment and assault claims "as soon as current litigation is resolved." The company is considering the same option for current workers. More here.

ON TAP TODAY

At noon: The American Bar Association Women's Initiative will discuss how to be an effective leader, attain upward mobility, negotiate salary and other employment terms and "have difficult conversations in the workplace with confidence and grace." Former FTC Acting Chairwoman Maureen Ohlhausen will participate. More info here.

At 1 p.m.: Chris Armstrong, human trafficking section chief at DHS's Homeland Security Investigations and Marcia Eugenio, director of the DOL's Office of Child Labor, Forced Labor, and Human Trafficking in the Bureau of International Labor Affairs, among others, will participate in a discussion on "Government Agencies" during Rotary International and Jones Day's National Human Trafficking Summit. More info here.

At 2 p.m.: The Congressional Dietary Supplement Caucus will hold a briefing on "Hemp-Derived Cannabidiol (CBD): Legal and Business Perspectives." 1732 Longworth.

At 5:25 p.m.: Mexican Minister of Foreign Affairs Marcelo Ebrard will deliver remarks on "Mexico-U.S. Relations, USMCA, and Mexico's Foreign Policy Agenda," during the Americas Society/Council of the Americas 49th Washington Conference of the Americas.

Acting Homeland Security Secretary Kevin McAleenan will also speak at 5:50 p.m. on "Building Regional Prosperity and Security." The conference takes place at the State Department. More here.

COFFEE BREAK

— "As NewsGuild holds election, members say union has been too passive," from Columbia Journalism Review

— "Where 2020 Democrats s tand on immigration," from The Washington Post

— "Portland Council To Take Up Paid Sick Leave Measure," from Maine Public Radio

— "Uber, Lyft drivers plan to strike ahead of Uber's IPO," from The Washington Post

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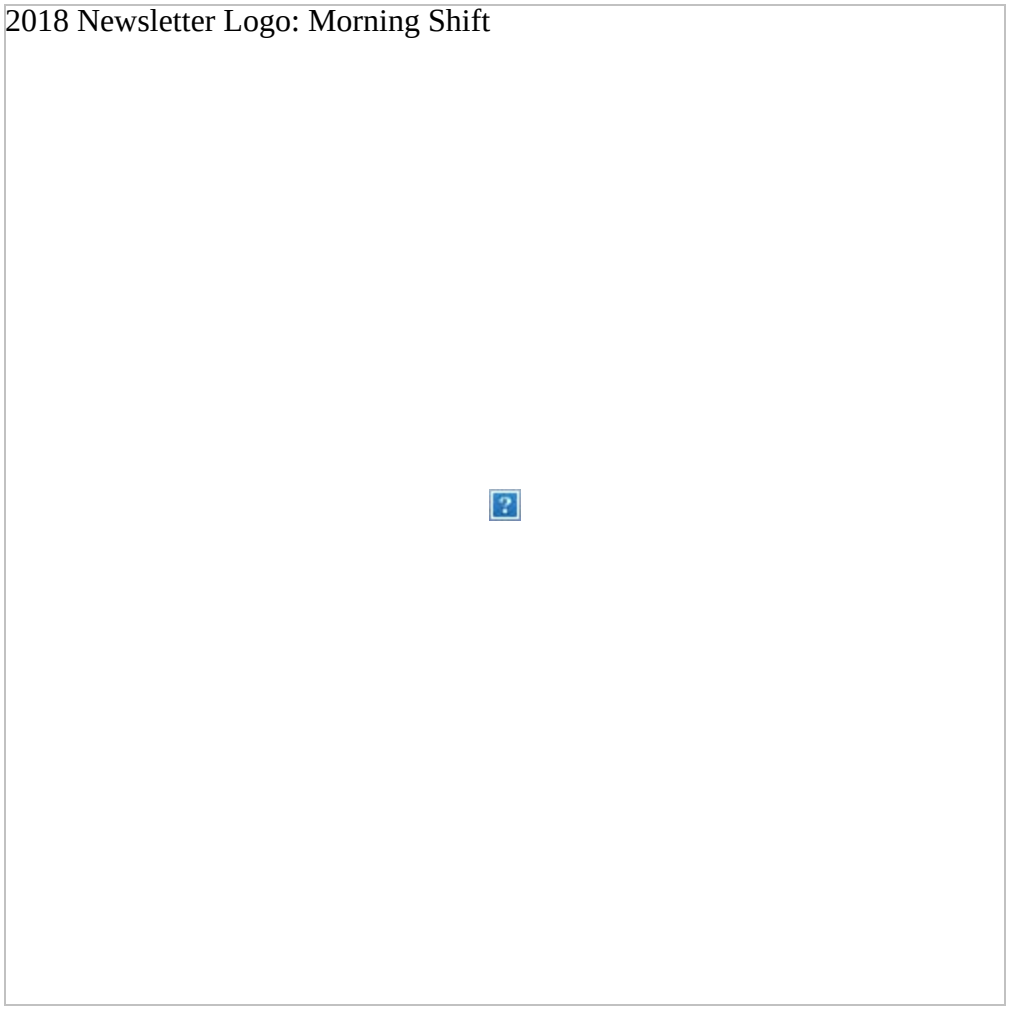

05/10/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Sam Mintz

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QUICK FIX

— The Trump administration's immigration plan may require businesses to use E-Verify to check work authorizations for their employees.

— The Women's Bureau's new acting head is a former oil communications executive who has vigorously disputed studies that document health risks to fracking workers.

— The UAW asked the NLRB to lift its stay on a unionization vote at Volkswagen's plant in Chattanooga.

GOOD MORNING! It's Friday, May 10, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

MANDATORY E-VERIFY?: "The White House is considering including mandatory nationwide E-Verify in its proposal to reform the legal immigration system" POLITICO's Ted Hesson and Anita Kumar report. Making the currently voluntary electronic system mandatory could sweeten Jared Kushner's immigration plan for restrictionist groups like the Center for Immigration Studies that have complained swapping family-based admissions for merit-based admissions, as Kushner's plan does, won't reduce net legal immigration. Hesson and Kumar report that E-Verify may "become part of a separate legislative effort," but that it was included in recent White House immigration bill discussions. More here.

INSIDE THE AGENCIES

WOMEN'S BUREAU HELMED BY FRACKING STRATEGIST: Erica Clayton Wright, the new acting director of the Women's Bureau, vehemently fought to discredit scientific studies documenting health risks to fracking workers in her previous job as a communications executive for a hydraulic fracturing lobbying group, POLITICO's Ian Kullgren reports.

"It's sad that some shoddy so-called 'studies' focused on attacking American energy and the tens of thousands of hardworking Pennsylvanians that work across the industry are the subject of fake news stories like these," Wright told Rolling Stone last year, when she was vice pr esident of communications and membership for the Marcellus Shale Coalition . Wright "was responding to a medical study by the Concerned Health Professionals of New York and Physicians for Social Responsibility — the U.S. arm of a Nobel Peace Prize-winning group — showing that oil workers suffered heightened levels of benzene, a carcinogen, in their urine," Kullgren writes. More here.

LABOR BOARD

UAW ASKS NLRB TO ALLOW VW VOTE: The United Autoworkers filed a request Thursday with the NLRB to lift its stay on a union vote at Volkswagen's Chattanooga plant. The NLRB last week suspended its proceedings on whether to allow workers at the plant to vote on unionization. POLITICO's Ted Hesson reported that the board's Republican majority sided with the German car manufacturer on the grounds that the board hadn't yet resolved an earlier dispute with the UAW over whether the union may organize a subgroup of maintenance workers.

But the UAW says that dispute was resolved earlier this week when NLRB Region 10 "accepted the withdrawal of charges" by those maintenance workers. The UAW said last month that it would withdraw its petition to organize the maintenance workers and instead include them in its new petition for a plant-wide vote.. Read the UAW's filing here.

UNIONS

CASTRO 2020 CAMPAIGN RECOGNIZES UNION: "Staffers on Julia??n Castro's presidential campaign have unionized after unanimously signing onto the Campaign Workers Guild," Gideon Resnick reports for The Daily Beast. "Castro has recognized the union per a neutrality agreement reached with CWG."

Castro's is the second presidential campaign to unionize. Bernie Sanders' 2020 campaign, which similarly remained neutral about organizing, signed a union contract with its staff earlier this week.

"It's not enough to talk the talk. You have to walk the walk." Castro tweeted

Thursday evening. "We're doing this at every step of this campaign." Read a press release from the Campaign Workers Guild here.

FLYING LOW: A photo sped through the Twitterverse Thursday of a provocative anti-union poster, apparently part of a Delta campaign, prompting a few high-profile actors, musicians and journalists to say they won't fly on the airline. Here's what the poster said: "Union dues cost around $700 a year. A new video game system with the latest hits sounds fun. Put your money towards that instead of paying dues to the union."

The backstory: Delta flight attendants and baggage handlers have been organizing to unionize with the International Association of Machinists and Aerospace Workers, and the company opposes the effort. IAM said Delta escalated after the union campaign went international. "Delta has resorted to defaming and spewing lies and misrepresentations about the IAM," IAM said in a written statement. **"** They also continually display anti-IAM propaganda in the workplace. These are all hallmark signs of how well the IAM campaigns are doing and how scared Delta is of their employees having a voice in their careers."

Delta said in a written statement that its workers "want and deserve the facts and we respect our employees' right to decide if a union is right for them. Delta has shared many communications, which on the whole make clear that deciding whether or not to unionize should not be taken lightly."

USDA WORKERS UNIONIZE: Employees at the USDA's Economic Research Service Thursday voted 138-4 to join the American Federation of Government Employees, report POLITICO's Liz Crampton and Ryan Mccrimmon. The union drive took off late last year following Agriculture Secretary Sonny Perdue's decision to bring the Service under the control of USDA's chief economist (who reports more directly to the secretary), and to move the branch out of Washington."We will be pressing for delay and reconsideration of the relocation decisions," said Peter Winch, an organizer for AFGE.

McCrimmon reported earlier this week that ERS economists say the Trump administration is retaliating against them for publishing reports that detail how Trump's trade feuds harm farmers financially and how the 2017 tax bill benefits the wealthiest farmers. Fo llowing the vote, Perdue said in a statement that "we will work with this group of employees just as we work with all USDA employees." More here.

STRIKES

FLIGHT ATTENDANTS MOVE CLOSER TO STRIKE: After nearly three years of union contract negotiations, the Association of Flight Attendants asked the National Mediation Board Thursday to discontinue talks with Air Wisconsin, a United Express carrier. The move could set up a 30-day deadline for both parties to reach an agreement before the 300 flight attendants the union represents go on strike.

"This is our number one contract fight," AFA President Sara Nelson said Thursday. According to the AFA**,** starting flight attendants salaries at Air Wisconsin can be as low as $15,000 a year, and all flight attendant wages "have been frozen" at 2007 rates. Conditions at Wisconsin Air, Nelson told Morning Shift, constitute "one of the worst examples" of a common "scam" in which major airlines outsource domestic flights to regional airlines, driving down wages. "In the process of bidding for these contracts they keep costs as low as possible," Nelson explained. "And what that has done has set the regional pay for flight attendants, pilots and other workers at 45 percent less on average." Read the request to the National Mediation Board here.

WAGES

EXPECT FASTER WAGE GROWTH: "Most private-sector forecasters surveyed in recent days by The Wall Street Journal&m dash;63.6%—expect wages will grow at a somewhat faster rate over the next year," Harriet Torry reports for the Journal. However, only 23.6 percent "expect wages to grow at the same 3.2% year-over-year pace seen in April." More here.

TRADE WINDS

TARIFF THREAT: President Donald Trump said Thursday that his administration was "starting the paperwork today" to impose a 25 percent tariff on roughly $200 billion worth imports from China, just ahead of talks with Chinese trade officials that evening, POLITICO's Adam Behsudi reports. The tariff increase is slated to take effect at 12:01 a.m. Friday and China has warned it will retaliate. "Trump decided to impose the higher duties after learning that China balked on a demand that it codify a wide-range of commitments it had made in the 150-page draft deal," according to Behsudi.

The tariffs are expected to go into place, and workers and companies could take

a hit. A recent study< /a> commissioned by a group opposed to the tariffs estimates that an expanded trade war could result in a net loss of 2.2 million jobs and raise prices for goods and services for the average family of four by nearly $2,400. More here.

Related: "Trump gambles with economy on China showdown as 2020 looms," from POLITICO

COFFEE BREAK

— "Nearly Two Decades Ago, Women Across the Country Sued Walmart for Discrimination. They're Not Done Fighting," from TIME

— "Ube r Settles 'Majority' of Arbitrations for at Least $146M," from Bloomberg Law

— "MTA plans to use police to monitor LIRR employees' overtime," from New York Daily News

— "AP finds 13,000 asylum seekers on border wait lists," from The Associated Press

— "Google Uses 'Bait and Switch' in Diversity Hires, Worker Alleges," from Bloomberg Law

— "Facebook Co-Founder Chris Hughes Says Company Should Be Broken Up," from The Wall Street Journal

— "Walmart store managers average $175,000 a year. Many employees still earn below the poverty line." from The Washington Post

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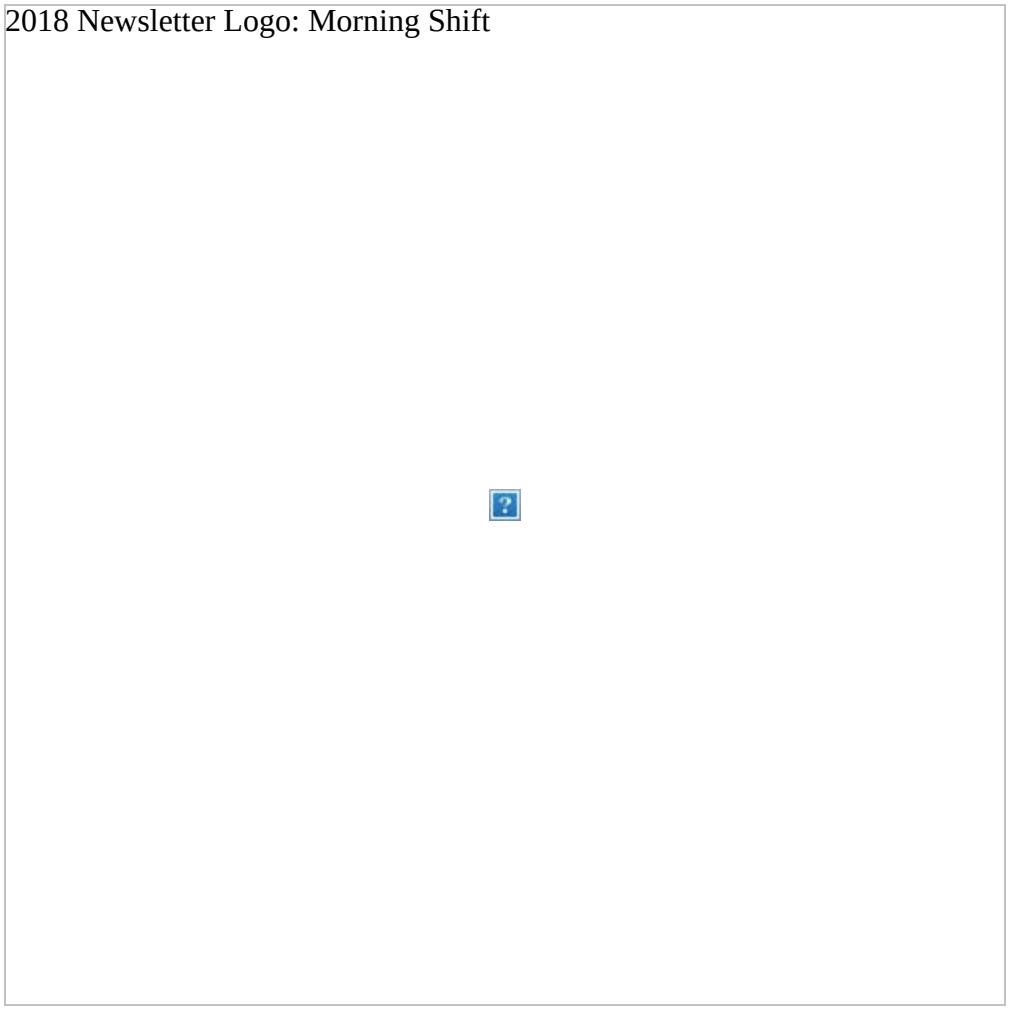

05/01/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ted Hesson

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QUICK FIX

— Labor and management agree that rebuilding the nation's infrastructure should be paid for with a gas-tax hike.

— President Trump wants to create an asylum fee, but most countries don't charge refugees admission.

— The New York attorney general is looking into whether the Trump Organization required employees to work overtime and complete side work without pay.

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DRIVING THE DAY

PLAYING NICE ON INFRASTRUCTURE: President Donald Trump and Democratic leaders had a "surprisingly productive" 90 minute discussion Tuesday about infrastructure, POLITICO's Anita Kumar, Sarah Ferris, and Burgess Everett report. Senate Minority Leader Chuck Schumer and House Speaker Nancy Pelosi said during the "very constructive meeting" that they agreed with the president to spend $2 trillion to repair the nation's crumbling roads and bridges. But the parties didn't agree (and aren't likely to soon) about where the money will come from.

The Associated Press' Kevin Freking and Lisa Mascaro note that the infrastructure issue "has aligned the nation's top business gro ups and unions, a rarity in Washington," and that labor and management both agree that it could be paid for by increasing the federal gasoline tax, currently 18.3 cents a gallon and last raised in 1993. But Schumer has rained on that proposal . A source close to the senator told reporters Monday that he would consider a gas-tax hike only if Trump agreed to repeal parts of the 2017 tax overhaul. That didn't please the AFL-CIO. **"**We're one group that didn't care very much for the tax package," Tom Trotter, legislative affairs representative at the AFL-CIO, said. "But on the other hand, we

want to get something done, and I don't see any way that, should that be the choice, that anything would get done." More on the Tuesday meeting here.

AT THE BORDER

TRUMP'S ASYLUM FEE PLAN: Trump's plan to impose fees on asylum applications bucks a global trend, the Washington Post re ported earlier this week. The Post cited a 2017 Library of Congress report that found the "vast majority" of 147 countries that provide asylum did not charge a fee to request the benefit.

David Martin, a former DHS general counsel, pointed out to the Post that asylum seekers tend to have scant resources when they arrive, since they "by definition leave in the most urgent of circumstances." The fee — and a separate move to bar certain asylum seekers from working legally while their applications are pending — would impose new financial burdens on already-desperate migrants.

Still, a federal statute gives DHS the power to impose a fee to cover the costs of adjudicating asylum applications. (The statute also allows DHS to attach a fee to employment authorization applications by asylum seekers.) And a handful of countries &mdas h; including Australia, Canada, Fiji and New Zealand — do charge asylum fees.

BILLIONS FOR THE BORDER: The White House is expected as early as this week to ask Congress for billions in emergency funding to address the humanitarian crisis at the U.S.-Mexico border--with not a dollar of it spent to build a border wall, POLITICO's John Bresnahan, Eliana Johnson and Sarah Ferris report.

"In addition to more money for the Homeland Security Department, the White House is also expected to seek additional funds for HHS and the Justice Department — 'every stage of migrant processing,'" they report. Acting Homeland Security Secretary Kevin McAleenan confirmed the administration's plans to seek extra money to "address critical humanitarian requirements" at a Tuesday House appropriations hearing, but gave no dollar figure. More from POLITICO here.

FEDS

SELL YOUR MOORE STOCK: "It appeared the wheels were beginning to come off" Stephen Moore's nomination to the Federal Reserve Tuesday, POLITICO's Burgess Everett and Victoria Guida report, as more than half a dozen Republican senators expressed uneasiness about Moore's past derogatory comments about

women and his criticisms of fellow conservatives.

"It's going to be a problematic nomination," said Sen. Lindsey Graham (R.-S.C.). "I actually like Stephen Moore, but there's some th ings out there that are going to make it hard." On Monday White House press secretary Sarah Huckabee Sanders said Moore's writings were being reviewed and "when we have an update on that front, we'll let you know." More from POLITICO here.

IMMIGRATION

CONCERNS ABOUT ILLEGAL IMMIGRATION AT THE BORDER GROW: More than one third (35 percent) of Americans believe illegal immigration at the U.S.-Mexico Border is a "crisis" according to new Washington Post/ABC News poll released Tuesday. Even more, 45 percent, say it's not a "crisis" but is "a serious problem." Among Democrats , only 24 percent view the situation as a "crisis," but that's up from 7 percent in January. Border arrests have spiked to the highest levels in a decade as growing crowds of migrants, mostly families, from Central America, try to enter the U.S.

NY AG LOOKING INTO TRUMP CLUB PAY PRACTICES: The New York Attorney general is looking into whether President Donald Trump's golf club in Briarcliff Manor, N.Y., routinely required employees to work hours without pay, The Washington Post's Joshua Partlow and David Fahrenthold report. Former Trump National Golf Club workers told the Post they were required to clock out and complete side work, and others said they worked 60-hour weeks without overtime.

The workers "felt systematically cheated because they were undocumented" and were "denied promotions, vacation days and health insurance, which were offered to legal employees," they report. Nearly 30 former employees at Trump's New York golf courses (many whom are undocumented immigrants) met and sat for several-hour interviews with prosecutors in February over pay practices at the Trump company. More meetings are scheduled in the coming weeks, according to the Post. More here.

NOMINATIONS

PBGC NOMINEE CONFIRMED: The Senate Tuesday voted 72-27 to confirm Gordon Hartogensis, brother-in-law to Senate Majority Leader Mitch McConnell,

to direct the Pension Benefit Guaranty Corporation, POLITICO's Ian Kullgren reports. He'll be faced immediately with a $54 billion private multiemployer pension crisis that Congress has thus far been unable to solve. More here.

BUDGET & APPROPRIATIONS

HOUSE ADVANCES FUNDING BOOST FOR DOL: House appropriators approved by a voice vote Tuesday legislation that would provide DOL with a 10 percent increase in funding for fiscal year 2020. More from POLITICO's Ian Kullgren and Ted Hesson here.

Other appropriations news:

— "House Democrats' MilCon-VA spending bill would block border wall funding," from POLITICO

CIVIL RIGHTS

GOP STILL HAS PROBLEMS WITH THE EQUAL RIGHTS AMENDMENT: A House Judiciary subcommittee Tuesday held the first congressional hearing in 36 years on the Equal Rights Amendment. Republican lawmakers flagged two potential obstacles to reviving the constitutional amendment: abortion and gender identity.

"The people's right to protect the unborn would be eliminated if the ERA were to pass," said Rep. Mike Johnson (R-La.), ranking Republican on the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Laws that bar federal funds from being spent on abortions (except in limited cases) would be rendered unconstitutional, Joh nson argued, because that would be considered a type of discrimination based on sex. But Rep. Carolyn Maloney (D-N.Y.) replied that "the ERA has absolutely nothing to do with abortion, it has to do with equality of rights, most of which [are] economic, and respect." To bring abortion into the discussion, she said, "is just divisive and a tool to try and defeat it. So please don't ever say that again."

Rep. Louie Gohmert (R-Texas) said he couldn't support the ERA because he "heard at this hearing that sex and the Equal Rights Amendment includes gender identity, which we know absolutely is not an immutable difference." Watch a recap of Gohmert's comments here.

Congress passed the ERA in 1972, clearing the necessary two-thirds majority (354-24 in the House, 84-8 in the Senate). But only 35 of the necessary 38 states ratified the amendment by its 1982 deadline. In the current session, Democrats have introduced bills in both chambers that would restart the ratification process or, alternatively, revoke the 1982 deadline.

PAYDAY

'LIVING WAGE' FOR CONGRESSIONAL INTERNS: Rep. Adam Smith (D-Wash.) and three dozen Democratic co-sponsors reintroduc ed legislation last week, H.R. 2370 (116), that would require Congress to pay its interns at least $15 per hour. The $15 minimum would subsequently rise automatically with the Consumer Price Index. Congress approved funding last year that set aside up to $20,000 per House member and $5 million for the Senate (that's $50,000 per senator) to pay congressional interns.

Carlos Vera, founder of the nonprofit Pay Our Interns, told Morning Shift that it's "imperative" that lawmakers increase pay for interns, noting that the $20,000 maximum allocated per House office typically funds "a dozen or more interns" who are paid "less than $1,000 for 3-4 months... No one with a working-class background can afford to live in DC with that amount." Read Smith's announcement on the legislation here.

COFFEE BREAK

— "Ex-NFL Cheerleaders Speak Out Against Sexism and Abuse: 'We Deserve to Be Respected,'" from The Daily Beast

— "Survey: Californi a farmers struggling to find workers," from POLITICO

— "'Preferably Caucasian' job ad sparks Twitter controversy," from HR Dive

— "Exclusive: Booker, House Dems introduce most ambitious bill yet to curb immigration detention," from Vox

—"Obama-Era Joint Employer Test Belongs i n Dustbin: NLRB Lawyers," from Bloomberg Law

— "Trump intensifies calls on Fed to cut interest rates," from POLITICO

— "Critics lament Joe Biden's support for a bill leading to Teamsters pension cuts,

after he hosted his campaign kickoff at Pittsburgh Teamster hall," from Pittsburgh City Paper

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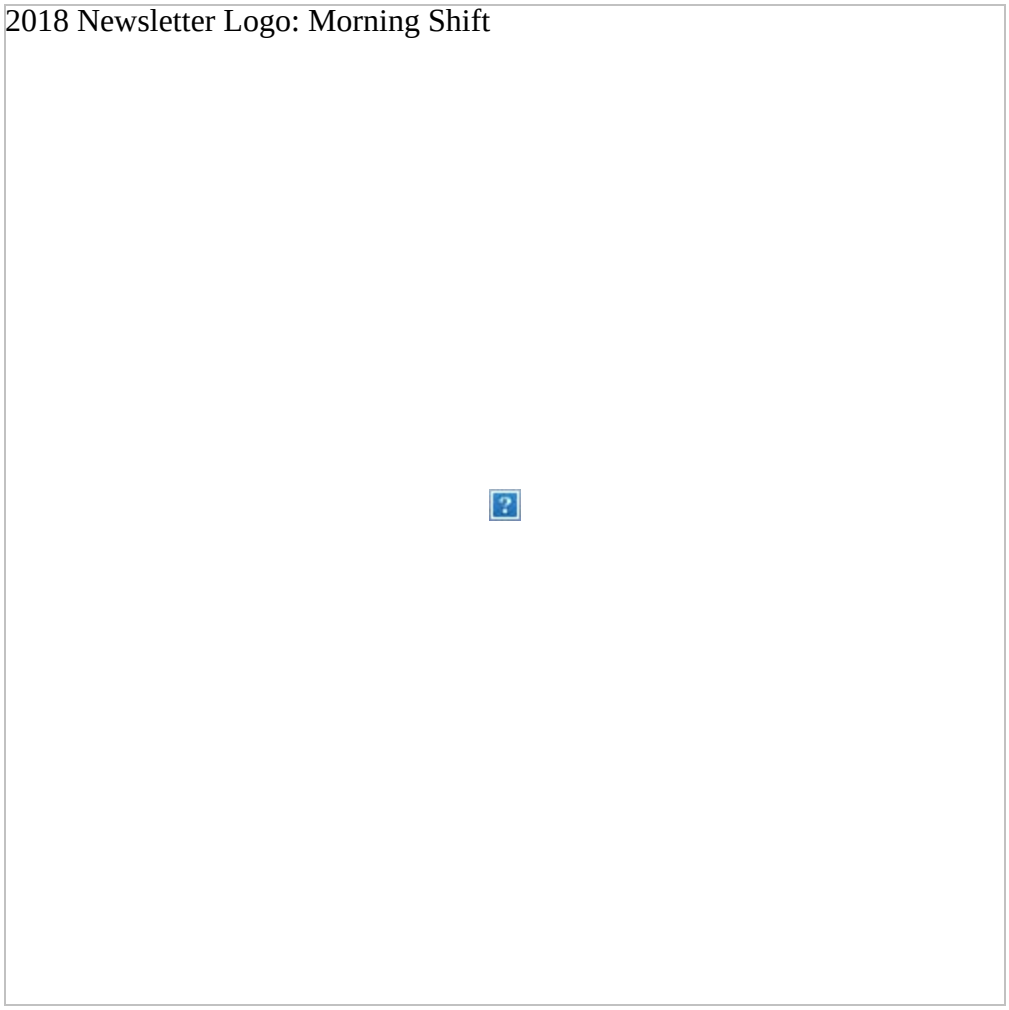

05/09/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Dan Diamond and Tim Noah

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

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QUICK FIX

— In an apparent first, a presidential campaign — Bernie Sanders 2020 — signed a union contract with its staff.

— Border arrests continued to climb in April. More than half were of family members.

— The Senate confirmed Janet Dhillon for a Republican seat on the EEOC, restoring a quorum at the agency — for now.

GOOD MORNING! It's Thursday, May 9, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

BERNIE RATIFIES UNION CONTRACT: Morning Shift is fairly certain that before yesterday no U.S. presidential candidate had ever signed a union contract with his or her campaign staff. That changed Wednesday, POLITICO's Ian Kullgren reports, when Sanders 2020 workers represented by United Food and Commercial Workers Local 400 ratified a contract with Bernie Sanders. "Unions are my family. I have worked with them my entire life, and I am incredibly proud this campaign will be powered by union workers," Sanders tweeted Wednesday afternoon. "Together, we are going to rebuild the labor movement in America." UFCW Local 400 President Mark P. Federici called it "a model experience in every respect," and urged "every other campaign to follow their lead."

The contract includes, according to UFCW, full health benefits and a minimum $20 an hour pay for interns; overtime pay for all hourly employees; "robust anti-discrimination protections;" a doubling (to 20) of vacation days; regularly scheduled staff breaks throughout the day and "mandatory time off between particularly long shifts;" and, "in keeping with Senator Sanders' emphasis on fighting income inequality," a pay cap for management "proportional to union employees' salaries."

"Unionizing political campaigns is a new endeavor," Kullgren writes, and the first instance anyone can remember occurred only last year in the campaign of Randy Bryce, an iron worker who ran unsuccessfully for the Wisconsin congressional seat vacated by House Speaker Paul Ryan. "The Campaign Workers Guild, a new union dedicated solely to organizing campaign workers," subsequently won union contracts for more than two dozen political campaigns. With the advent of Sanders' new union shop, other Democratic presidential campaigns will likely feel heavy pressure to unionize too. More from Kullgren here. Read the UFCW press release here.

Related read: "Sanders pledges to restore pension cuts," from POLITICO's Ian Kullgren

AT THE BORDER

BORDER ARRESTS CLIMB: Border Patrol arrested nearly 99,000 migrants at the southwest border in April, a near 7 percent increase compared with March, POLITICO's Ted Hesson reports. "The monthly totals are the highest in more than a decade, and are starting to resemble those observed in the 1980s, 1990s and early 2000s, when annual arrests routinely topped one million." More than 58,000 family members were arrested by Border Patrol in April, representing more than half of the monthly total. More from Hesson here.

HEALTH CARE

WHITE HOUSE REASSURES INDUSTRY ON ASSOCIATION HEALTH PLANS: The Trump administration quietly convened trade groups and policy analysts Wednesday to discuss the path ahead for association health plans, two individuals with knowledge confirmed to POLITICO's Dan Diamond. CBO in January concluded that the new association health plans, which are designed for small businesses or the self-employed, would likely offer fewer health benefits than their Obamacare alternatives. That lowers the plans' upfront cost — but also puts patients at greater risk of paying out of pocket.

More federal guidance is coming, these individuals said, including an FAQ from the Labor Department, as the administration tries to soothe concerns after a recent court order effectively froze the plans' growth. The message was "keep calm and carry on," according to one person in the room. The industry's been worried about the fate of association health plans since a federal court in March tossed out Trump

administration regulations that encourage the plans' formation.

The Labor Department last month advised that the plans not sign up new businesses, although they can continue to serve current customers. Leading Wednesday's conversation was Labor Secretary Alex Acosta, along with White House economic official Brian Blase, who's played a key role in developing the association plans as an Obamacare alternative. In attendance: The Chamber of Commerce, the National Association of Realtors, the National Restaurant Association, the Foundation for Government Accountability and others. White House, Labor and HHS staff also joined the conversation.

CIVIL RIGHTS

WILL DHILLON SHIFT THE EEOC ON LGBT RIGHTS?: The Senate confirmed Janet Dhillon Wednesday, 50-43, for a Republican seat on the EEOC, restoring a three-person quorum to the board for the first time in months, POLITICO's Ian Kullgren reports. But it's uncertain how long that quorum will last. The term for EEOC commissioner Charlotte Burrows, who holds one of two slots reserved for Democrats on the five-person commission, expires July 1.

Dhillon's nomination was held up for months by a dispute between Sens. Mike Lee (R-Utah) and Patty Murray (D-Wash.) that involved LGBT rights. Lee blocked confirmation of Democratic commissioner Chai Feldblum, a lesbian and the first openly LGBT EEOC commissioner, calling her "an activist intent on stamping out all opposition to her cause," prompting Murray to delay action on Dhillon and other nominees. Speaking from the Senate floor Wednesday, Murray complained that Dhillon, who will now chair the commission, "refused to commit to maintaining the EEOC's current—and critical—position that LGBTQ workers are protected under the Civil Rights Act." The EEOC's position, a holdover from the Obama administration, puts it at odds with the Trump Justice Department, which reversed its Obama-era policy to say that LGBTQ workers weren't protected under the Civil Righ ts Act.

A bill clarifying that illegal sex-based discrimination under the Civil Rights Act includes discrimination based on sexual orientation and gender identity, H.R. 5 (116), is expected to reach the House floor for a vote next week. More on the confirmation here.

APPROPRIATIONS

H-2B CHANGES APPROVED IN DOL SPENDING BILL: The Labor Department will receive $13.3 billion in funding for fiscal 2020 (a $1.2 billion boost from the 2019 enacted level) under a fiscal 2020 spending draft for the departments of Health and Human Services, Labor and Education, approved by House appropriators Wednesday, POLITICO's Adam Cancryn reports . The draft was advanced along party lines 30-23. The Senate has yet to begin work on its version of the spending plan.

The Democratic-controlled appropriations committee also approved a change to the the way H-2B visas are allocated, instructing DHS and DOL to distribute them quarterly instead of twice a year, POLITICO's Ian Kullgren reports. The amendment, proposed by Rep. Andy Harris (R-Md.), also requires the DHS secretary to readjust the quarterly allocations every two years and grants DHS "unreviewable discretion" to make changes, with input from the Labor secretary. More on the amendment here.

CATCHING OUR ATTENTION

FACEBOOK CONTRACTORS SEEK BETTER CONDITIONS: The 15,000 contracted content moderators who monitor and remove violent content from Facebook, are "spearheading a quiet campaign inside the social media giant" over "micromanagement, pay cuts, and inadequate counseling support while doing some of Facebook's most psychologically taxing jobs," The Washington Post's Elizabeth Dwoskin reports. "As contractors employed by outsourcing firms, these content moderators don't get Facebook's cushy six-month maternity leave, aren't allowed to invite friends or family to the company cafeteria, and earn a starting wage that is 14 percent of the median Facebook salary."

Over the past several months moderators have been utilizing Facebook Workplace, an internal communication system, to post letters about their complaints. They also say "they are planning to issue a list of demands in the coming weeks, including for affordable health insurance and opportunities for raises," Dwoskin reports. The strife follows other recent employee-led uprisings at tech companies over working conditions and treatment of contractors. Thousands of Uber and Lyft drivers planned strikes and demonstrations across the country Wednesday over these issues. Google announced last month that it will require its contractors to provide health benefits, a $15 minimum wage, and paid parental leave after more than 900 of its employees signed a letter pressing the company on

its treatment of contract workers. More from the Post here.

JOBS, JOBS, JOBS

GM SELLS OHIO PLANT: "General Motors is selling its plant in Lordstown, Ohio, to a small electric truck-maker called Workhorse, President Donald Trump tweeted today — news that could blunt anger in the battleground state over the impending loss of 1,700 jobs," POLITICO's Tanya Snyder reports. "GREAT NEWS FOR OHIO!" Trump tweeted . "Just spoke to Mary Barra, CEO of General Motors, who informed me that, subject to a UAW agreement etc., GM will be selling their beautiful Lordstown Plant to Workhorse, where they plan to build Electric Trucks." The auto manufacturer shuttered the plant in March following an announcement last year that it would close five North American plants and lay off 14,700 workers.

GM estimates the move could create 400 jobs at the Lordstown plant. However, "the acquisition confused some observers," Snyder notes, who pointed out Workhorse is a company with just 98 full-time employees. "In response to General Motors' announcement today, the UAW's position is unequivocal," UAW Vice President Terry Dittes said in a statement, "General Motors should assign a product to the Lordstown facility and continue operating it ." GM also announced Wednesday that it is investing approximately $700 million and creating another 450 new manufacturing jobs in Toledo, Parma and Moraine, Ohio. More here.

ON TAP TODAY

At 8 a.m.: POLITICO Live will hold a discussion on "The United States of Entrepreneurs," focusing on policy solutions to the barriers that small business owners and entrepreneurs face. Karen Kerrigan, president and CEO of the Small Business and Entrepreneurship Council, Rep. Bill Huizenga (R-Mich.) and Rep. Andy Kim (D-N.J.), will speak at the event. It takes place at the Marriott Courtyard Convention Center. Find more info here.

At 9 a.m.: The Center for Strategic and International Studies will hold a discussion on the consequences of cutting U.S. aid to the Northern Triangle countries of Guatemala, Honduras and El Salvador. Dan Fisk, former senior director for the Western Hemisphere at the National Security Council, and former U.S. Ambassador to Guatemala Stephen McFarland will participate.

At 10 a.m.: A House technology panel will hold a hearing on "Achieving the

Promise of a Diverse STEM Workforce." 2318 Rayburn. Watch it here.

At 11 a.m.: Del. Eleanor Holmes Norton, (D-D.C.), will hold a discussion on how Congress can further the success of minority-owned small businesses. 2136 Rayburn.

Also at 11 a.m.: The Federal Reserve System will hold a discussion on "Trends in Jobs and the Labor Market" during its 2019 Community Development Research Conference on "Renewing the Promise of the Middle Class." The event takes place at the Marriott Marquis. Find more info here.

At 1 p.m.: The American Bar Association Section of Taxation will hold a session on "But I'm A TAX Lawyer: Working with Immigration, H2-A and Other Residency Issues," during its 2019 May Tax Meeting. More info here.

At 2 p.m.: A House Homeland Security subcommittee will hold a hearing on Trump's fiscal year 2020 DHS budget request. Last week, the White House called on Congress to pass an emergency $4.5 billion-supplemental spending bill to cover costs related to the border crisis and other enforcement actions. Cannon 310. Find a livestream here.

COFFEE BREAK

— "Immigration stalemate looms before talks even begin," from POLITICO

— "Americans See Advantages and Challenges in Cou ntry's Growing Racial and Ethnic Diversity," from Pew Research Center

— "DeLauro accuses DeVos of trying to 'villainize' teachers," from POLITICO

— "Mexico Proposes Redirecting U.S. Security Aid to Address Migrant Crisis," from The Wall Street Journal

— "Blumenauer blasts Trump's 'drive-by' tariff policy," from POLITICO

— "The Surprising New Effect Of Trump's Immigration Crackdown," from POLITICO Magazine

— "How new research is shaking up the debate about a $15 minimum wage," from Vox

— "Pentagon expects 256 miles of border wall soon, Shanahan says," from

POLITICO

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05/08/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Tim Noah

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

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QUICK FIX

— Thousands of Uber and Lyft drivers will strike today in cities across the country.

— Jared Kushner's immigration proposal trades family-based migration for merit-based migration — but restrictionists complain it won't reduce immigration numbers overall.

— Members of the National Union of Healthcare Workers will picket a Joe Biden fundraiser today.

GOOD MORNING! It's Wednesday, May 8, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

RIDESHARE DRIVER STRIKE TODAY: You may have trouble summoning a Lyft or Uber driver today if you live in Los Angeles, New York City, San Francisco, Boston, Philadelphia, San Diego, Atlanta, or Washington, D.C. Thousands of rideshare drivers across those cities will log off their apps for several hours to demand better pay ahead of Uber's IPO later this week and Lyft's earnings report. The New York Taxi Workers Alliance — which represents 21,000 taxi and mobile rideshare drivers — instructed members to log off car-service apps from 7 to 9 a.m. In more automobile-dependent Los Angeles, 4,200 members of Rideshare Drivers United- Los Angeles will log off for 24 hours.

"At the crux of their argument is a measure known as 'take rate,'" Graham Rapier writes for Business Insider. "This fraction, which currently average[s] about 20 percent for Uber and 25 percent for Lyft, is the percentage of each fare the companies keep, with the rest going to the driver." More from Rapier here.

Related: "A Virginia Lawmaker Who Drives For Lyft Is Joining The Driver Strike," from The Huffington Post

IMMIGRATION

KUSHNER SELLS GOP ON LEGAL IMMIGRATION: Jared Kushner briefed senators Tuesday on his immigration overhaul, POLITICO's Andrew Restuccia and Burgess Everett report. The plan would modernize ports of entry along the U.S.-Mexico border and set up a new merit-based system that would reduce the number of family-based admissions, leaving the overall level of immigration the same. The plan would also consolidate and simplify the visa program, but does not address temporary visas.

Kushner's proposal is getting a cool reception from anti-immigration groups closely allied with President Donald Trump, raising some question about whether congressional hard-liners will accept it. "Leaving the overall immigration level the same but shifting from green cards to 'temporary' workers is a mistake in every respect," tweeted Mark Krikorian, executive director of the restrictionist Center for Immigration Studies. "We need a *cut* in immigration...." The similarly restrictionist Federation for American Immigration Reform "has also warned the White House that Trump risks violating a campaign pledge if the immigration levels don't go down," Restuccia and Everett write. More here.

2020 WATCH

PICKETING JOE: The National Union of Healthcare Workers will form an informational picket line outside a Los Angeles fundraiser today for Joe Biden, Dave Jamieson reports for the Huffington Post. The fundraiser is at the home of Dr. Cynthia Telles, a director of the Kaiser Foundation, which operates hospitals as a subsidiary of Kaiser Permanente. The health management company has been the target of a strike and an ad campaign organized by the union, which represents nearly 4,000 Kaiser psychologists and therapists, regarding staffing ratios and patient access to mental health care. The union has been negotiating with Kaiser over a new contract since last June.

"He should take our side in this dispute," Sal Rosselli, the union's president told Jamieson. "I think he should walk. He should cancel it." More here .

AT THE BORDER

BORDER WALL BATTLE: A bipartisan group of eight former House general counsels and acting general counsels filed a bri ef Monday urging a federal judge to

rule that the House may proceed with its lawsuit to bar President Donald Trump from spending $8.1 billion in unappropriated federal funds to build a border wall, POLITICO's Josh Gerstein reports. "Congress has used all of the political tools in its box," the amicus brief says. Justice Department lawyers are expected to file a response to the lawsuit today. More here.

More immigration news: "Appeals court allows Trump to keep asylum seekers in Mexico, for now," from POLITICO's Ted Hesson

TAX CUTS AND JOBS ACT

USDA ECONOMISTS UNDER SIEGE: Economists in the Agriculture Department's research branch say the Trump administration is retaliating against them for publishing reports on how Trump's trade feuds harm farmers financially and on how the 2017 tax bill benefits the wealthiest farmers, POLITICO's Ryan McCrimmon reports.

Recent maneuvers by Agriculture Secretary Sonny Perdue to bring the Economic Research Service — a source of closely read reports on farm income — under the control of USDA's chief economist (who reports more directly to the secretary), and to move the branch out of Washington, have prompted an exodus of experienced economists. Current and former agency employees told McCrimmon those decisions followed the Service's publishing of reports about the continuing decline in farm income, which has dropped about 50 percent since 2013, on Trump's watch. Rural voters were a crucial Trump constituency in 2016.

"The administration didn't appreciate some of our findings, so this is retaliation to harm the agency and send a message," said one current ERS employee, who asked not to be named to avoid retribution. More here.

CIVIL RIGHTS

EQUALITY ACT TO THE FLOOR: The House Rules committee announced Tuesday that it will meet next week to set parameters for floor debate of the Equality Act, H.R. 5 (116) , likely clearing the way for a floor vote next week. The House Judiciary Committee last week voted along party lines to approve the legislation that would amend the Civil Rights Act of 1964 to clarify that the law's prohibition against discrimination based on sex extends to sexual orientation and gender identity. Read the committee announcement here.